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UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MABEL MONROE BONDS, Appellant,

vs.

SHERBURNE MERCANTILE COMPANY,
a Corporation, and HUGH, BLACK, Appellees.

BRIEF OF APPELLEES

SHERBURNE MERCANTILE COMPANY,
a Corporation
and
HUGH BLACK

ART JARDINE
S. B. CHASE, JR.
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Great Falls, Montana
Attorneys for Appellees

Upon Appeal From The District Court of The United States
for the District of Montana

FILED

Filed

MAR 18 1948

Clerk

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**Upon Appeal From The District Court of The United States
for the District of Montana**

PRELIMINARY

There are two reasons why Appellant must fail in her appeal in this action.

First: The United States was and is an indispensable party.

Second: The Final Decree and Judgment of the Montana state court is *res adjudicata* in this action.

JURISDICTION

(a) *The United States is an Indispensable Party.*

The gist of this action is to quiet title in appellant, an Indian, to certain lands within the boundaries of the Blackfeet Indian Reservation in Montana, which appellant claims were originally allotted to her and a trust patent issued to her on or about February 28, 1918. (Appellant's Brief page 1, Record page 5 (which says 1916)).

The complaint further alleges that on or about July 1, 1920, the United States, through the office of the Commissioner of Indian affairs and the Department of the Interior, issued a patent in fee to said lands to appellant (Record pages 5-6).

It is apparent from the complaint and Appellant's brief that the fundamental basis of Appellant's action here is her claim that the fee patent so issued was void, so that the trust status of the land remained unaffected thereby. Thus, on pages 8 to 11 of her brief, Appellant lists eleven questions as presented by this appeal, and seven of them (namely, numbers 1, 2, 3, 5, 7, 9, and 11) directly refer to a forced fee patent or a fee patent issued without Appellant's consent. The remaining four (numbers 4, 6, 8, and 10) all boil down to a question whether it would make any difference if Appellant's name had been forged to a note and mortgage given after the patent issued.

However, these questions are simply collateral and incidental to Appellant's primary contention that the fee patent was void because forced. Appellant commences her argument with the statement that the controversy is based upon the mistaken policy of the United States in forcing fee patents upon Indian allottees on the Blackfeet Indian Reservation (Appellant's Brief page 12); concludes it with the statement that the "treatment of the *forced* patent-in-fee Indians is indefensible" (Appellant's Brief page 36) and continuously refers to such forced fee patents issued without consent throughout the course of the argument.

Similar contentions were considered by the Montana District Court from which this appeal is taken in the cases of *Gerard et al v. Mercer et al*, 62 Fed. Supp. 28, and *Gerard et al v. Sherburne et al*, 69 Fed. Supp. 940; and by this court upon the appeal of the latter case thereto. This court rendered its decision, affirming the judgment of the lower court, on February 11, 1948, in case number 11,591, entitled *Fred Gerard and Rose Gerard, Appellants vs. United States of America, J. L. Sherburne et al Appellees*. The effect of these decisions is that the United States is an indispensable party to an action to set aside a fee patent and enforce the rights of an Indian under a trust patent. Accordingly, when, as here, the Indian as an individual brings the action, his suit must be dismissed.

The jurisdiction of the District Court to entertain this case was challenged by Appellees by motion to dismiss filed as their first pleading in the action (Transcript page 12), which was by the court below denied (Transcript page 14).

It appears that such a motion, that the court lacks jurisdiction of the subject matter, includes the defense of want of jurisdiction because of a defect of parties by reason of the absence of an indispensable party.

See: Montgomery's Manual of Federal Jurisdiction and Procedure (Fourth Edition), page 221, Section 319, note 7, citing:

Hale v. Campbell, 40 Fed. Supp. 584
(D.C. W.D. Ark.) (Rev'd on other grounds,
127 Fed. (2d) 594 (C.C.A. 8th))

See also:

Young v. Garrett et al (D.C. W.D. Ark.)
3 F.R.D. 193;

Hanson v. Hoffman, 113 Fed. (2d) 780,
at p. 790 (C.C.A. 10th).

Also the Fifth Defense in the Answer is that "said Complaint fails to state a claim against Defendants, or either of them, upon which relief can be granted" and dismissal of the complaint is prayed (Record page 21). Lack of an indispensable party was held to result in a complaint failing to state a claim for relief in the case of *Redlands Foothill Groves v. Jacobs*, 30 Fed. Supp. 995, at page 1009 (D.C. S.D. Cal., C.D.).

In any event, the rule is stated in Vol. 2, Moore's Federal Practice on page 2190 as follows:

"If, of course, a truly indispensable party has not been joined, that defect can be raised at any stage, because the theory underlying the concept of indispensable party is that the court cannot enter a just and equitable judgment without the presence of such absent party."

The 1947 Cumulative Supplement to Moore's Federal

Practice states as follows on page 54, as an annotation to Page 2160:

“Dismissal for failure to join indispensable party.— As stated here in the Treatise and again at p. 2190, if a truly indispensable party has not been joined, that defect can be raised at any stage, because the theory underlying the concept of indispensable party is that the court cannot enter a just and equitable judgment without the presence of such absent party. *Calcote v. Texas Pac. Coal & Oil Co.*, (C.C.A. 5th, 1946) 157 F. (2d) 216; *Keegan v. Humble Oil & Refining Co.*, (C.C.A. 5th, 1946), 155 F. (2d) 971; *Brown v. Christman* (App. D.C. 1942) 126 F. (2d) 625 (appeal stage); *Neher v. Harwood* (C.C.A. 9th 1942) 128 F. (2d) 846, 6 Fed. Rules Serv. 19a.1, * * * .”

Since the United States is not a party, and since it cannot be made one since it has not consented to be sued, it would seem this action is subject to dismissal on this ground.

(b) *No other Federal basis.*

It may be contended that even though no jurisdiction exists to consider the questions relating to forced fee patent, there are other issues in the case as presented by questions 4, 6, 8 and 10, relating to the claimed invalidity of a note and mortgage given by Appellant after fee patent had issued, and possibly also by question 2 referring to the note having been given for a preexisting debt (although likewise referring to a forced fee patent), which present issues which the court could consider, even though the United States is not a party, although, on the authority of *United States v. Sherburne Mercantile Co.*, 68 Fed. (2d) 155, it well might be that the United States

is the proper party to bring suit on those grounds also.

Even assuming this to be so, we submit that there is no basis for founding jurisdiction in the Federal court on the basis of those issues alone.

The mere fact that plaintiff is an Indian does not of itself confer jurisdiction on the federal court.

Snyder v. Fancher, 7 Fed. Supp. 597;

Button v. Snyder, 7 Fed. Supp. 597;

Deere v. St. Lawrence River Power Company,
32 Fed. (2d) 550.

There is no claim of diversity of citizenship in the complaint, so as to base jurisdiction on this ground.

Nor is the fact that Appellant's patent was granted under United States laws or Appellant's rights take their origin in United States laws sufficient.

See:

Deere v. St. Lawrence River Power Company,
32 Fed. (2d) 550, where the court said:

"The claim that the St. Regis Tribe was guaranteed or recognized by the United States in treaties does not present a basis for original jurisdiction in the District Court * * * He does not contend for any particular construction of the treaties of 1784 and 1796, nor allege that appellees controvert any such construction."

In the case of *Marshall v. Desert Properties Co.*, 103 Fed. (2d) 551, this Circuit Court of Appeals said:

" * * * . It is well settled that a suit to enforce a right which takes its origin in the laws of the United States is not necessarily, for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such law, upon the determination of which the result depends. *Gully v. First National Bank*, supra. As said by the Supreme Court in *Cook County v. Calumet, etc. Canal Co.*, 138 U.S. 635, 11 S. Ct. 435, 440, 34 L.

Ed. 1110, 'The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority every time an act done by such authority is disputed.'"

STATEMENT OF THE CASE AND QUESTIONS PRESENTED

It is Appellees' contention that this case as now before this court on appeal presents only the following questions:

(a) The question whether the District Court below had jurisdiction and whether this court has jurisdiction since the United States is not a party.

(b) The question of whether the court below was correct in granting Appellees' Motion for Summary Judgment on the basis that a Final Judgment of a Montana state court was *res adjudicata*.

The jurisdictional question, (a) above, has heretofore been considered.

As to the Motion for Summary Judgment, it was made upon the basis that a final judgment of the state courts of the State of Montana quieting the title to the land here in question in favor of Sherburne Mercantile Company (Appellee herein) and against Mabel Monroe Bonds (Appellant herein) was *res adjudicata* (Record page 248), and the motion was granted by the court below on that basis (Record pages 251-252).

This defense was pleaded by Appellees as the Fourth Affirmative Defense in their Answer (Record pages 19-21) and in their subsequent Pleading Supplemental to Answer (Record page 59) which set out the opinion of the Supreme Court of Montana as Exhibit "A" (Record pages 62-64) and the Transcript on Appeal in said action as Exhibit "B" (Record pages 65-215), as well as pleading that said judgment had become final (Record page

60). Thereafter as a result of a pre-trial hearing, the parties stipulated as follows:

"That Plaintiff admits all of the allegations of the Fourth Affirmative Defense with regard to the action in the state court as set forth in the Answer of the defendants herein, and that Plaintiff likewise admits all of the allegations of defendants' Pleading Supplemental to Answer with regard to the action in the state Court, except that Plaintiff does not admit the conclusion therein set forth that the Decree and Judgment is *res judicata*, but leaves the determination of such matter to the Court as a matter of law." (Record page 227-228).

As a result of this stipulation admitting these *facts*, a clear issue of law was presented as to whether the Montana State Court proceedings, in themselves, constituted a valid defense of *res adjudicata* so that the case should be dismissed without the necessity of trying and determining the other complicated issues raised by the complaint, the answer and the other defenses therein contained, and the reply. Appellees brought this issue of law on for determination by Motion for Summary Judgment (Record page 248) and the Court entertained and granted the same upon this basis (Record pages 251-252, 254 and 256).

CONSIDERATION OF APPELLANT'S LIST OF QUESTIONS PRESENTED

As we have pointed out under "Jurisdiction," Appellant lists, on pages 8 to 11 of her brief, eleven questions as presented on this appeal. Seven of these (numbers 1, 2, 3, 5, 7, 9 and 11) deal directly with her contention that a fee patent was invalid and void because issued without Appellant's consent.

Certainly the seven questions dealing with the validity of the fee patent are necessarily eliminated from consideration by either this court or the court below for two reasons:

(a) The United States is an indispensable party to the consideration of such questions for the reasons set forth under "Jurisdiction."

(b) This is a suit by Appellant as an individual in which it is conceded that a fee patent has issued (the Complaint so alleges; see Record pages 5-6) and in such a suit the validity of the patent cannot be collaterally attacked:

Chatterton v. Lukin, 116 Mont. 419, 154 Pac. (2d) 798 (cert. den. June 18, 1945, 325 U.S. 880, 89 L. Ed. 1996, 65 S. Ct. 1572);

Steele v. St. Louis Smelting & Refining Co., 106 U.S. 447, 27 L. Ed. 226, 1 Sup. Ct. 389;

DeGuyer v. Banning, 167 U.S. 723, 42 L. Ed. 340;

U. S. v. Throckmorton, 98 U.S. 61, 25 L. Ed. 93.

"A suit to cancel a patent must be brought by the United States, and unless by virtue of an act of Congress, no one but the attorney general, or someone authoriezd to use his name can initiate the proceeding."

50 Corpus Juris, page 1114.

The other four questions set forth by Appellant all reduce to a single one as to whether it would make any difference if Appellant's name had been forged to a note and mortgage.

We believe it is a fair construction of Appellant's brief to state that these remaining four questions are simply collateral and incidental to her primary contention that the fee patent was void because forced, and that when the primary contention fails (as it must because it is one

which must be made by the United States as an indispensable party) Appellant's whole argument collapses, and the case must be dismissed.

But even if the question as to whether the note and mortgage were valid remains separate and apart from the question of forced fee patent, that question is conclusively disposed of by the fact that the Montana state court had disposed of it by a judgment and decree which is *res adjudicata* in the present case.

As a matter of fact, *all* of Appellant's questions, including the questions of forced fee patent, trust patent, preexisting indebtedness, etc. were raised by her as defenses in the Montana court proceeding, in which in addition she sought affirmative relief and asked title to be quieted in her, and have been disposed of therein by the final judgment and decree of that court.

Therefore, the question presented (in addition to the jurisdictional one) necessarily boils down to the effect of the Montana court's judgment and decree as *res adjudicata*.

SUMMARY OF ARGUMENT

(1) *Res Adjudicata*.

- (a) How the defense was presented.
- (b) Authorities supporting such presentation.
- (c) The action in the Montana Court was commenced prior to this action and final decree entered prior to any decree herein.
- (d) The Montana Court had jurisdiction to render the decree quieting title.
- (e) The fact that Appellant is an Indian or that construction of Federal laws relating thereto might be involved did not defeat the jurisdiction of the Montana Court.

- (f) The Decree and Judgment of the Montana Court was rendered on the merits, and Appellant by answer and counterclaim raised therein the issues she raises herein.
 - (g) The Montana Judgment and Decree was not based entirely on statutes of repose, as Appellant contends.
 - (h) Even a Decree based solely on conclusions of adverse possession and laches would be valid and binding on Appellant.
 - (i) The Opinion of the Supreme Court of Montana.
- (2) Appellants' Authorities.
 - (3) Conclusion.

ARGUMENT

1. *Res Adjudicata.*

(a) *How the Defense was Presented:*

In her complaint Appellant sought to quiet title to certain land in the State of Montana against Appellees, Sherburne Mercantile Company, a corporation, and Hugh Black (Record pages 3-10). Appellees' answer thereto both contained denials of the various allegations of this complaint (along with certain admissions), and likewise five affirmative defenses thereto (Record pages 16-22). The Fourth Affirmative Defense pleaded in effect that Sherburne Mercantile Company, in an action to quiet title against said Mabel Monroe Bonds prosecuted in the District Court of the Ninth Judicial District of the State of Montana, in and for the County of Glacier, had on June 15th, 1942, obtained a judgment decreeing it to be the owner of the lands here in question and quieting its title thereto as against said Mabel Monroe Bonds, Appellant herein, and that said action involved the same cause of

action as was involved in the present proceedings (Record pages 19-21). Thereafter, by leave of Court obtained, Appellees filed a Pleading Supplemental to Answer, setting forth that said judgment had been affirmed by the Supreme Court of the State of Montana and that the same had in all respects become a final judgment (Record pages 59-215). There was attached to this supplemental pleading, as an exhibit, a complete transcript of the record in the lower court as well as the opinion of the Supreme Court in the matter. Thereafter, as a result of a pre-trial conference, it was stipulated that Appellant admitted all of the allegations of the Fourth Affirmative Defense with regard to the action in the state court, and likewise all of the allegations of the Pleading Supplemental to Answer with regard to the action in the state court "except that plaintiff does not admit the conclusion therein set forth that the Decree and Judgment is *res judicata*, but leaves the determination of such matter to the court as a matter of law." (Record pages 227-228). Following this, Appellees brought on for determination of the court the issue of law so presented by filing their motion for summary judgment (Record pages 248-249). The basis of the motion was that any questions of fact as to that particular issue had been eliminated by the stipulation, so that simply an issue of law remained to be decided, and therefore if that issue were then considered and should be decided in favor of defendants, the necessity of trying the other issues raised by the answer and the other affirmative defenses therein should be avoided.

(b) *Authorities Supporting such Presentation:*

We believe the situation thus presented in the present case was similar to that presented in *Momand v. Para-*

mount Pictures Distributing Co., 6 Fed. Rules Decisions, page 222. In that case, defendants, after having filed their answers, thereafter moved for leave to file supplemental answers setting up affirmative defenses of estoppel by judgment. Since the original answers had been filed in 1937 and the judgments relied upon not entered until 1944, it was necessary in that case to obtain leave to present these judgments by supplemental answer. This is similar to the situation which was heretofore presented in our present case, and the court in the *Momand* case, as did the court in our present case, granted leave to file the supplemental answers.

In the *Momand* case, the defendants then filed a motion asking a separate trial of the issue of the defense of estoppel by judgment as raised by the supplemental answers, pointing out that if this defense were proved, it would put an end to the cases and avoid a complicated trial of the many other issues involved in the case. The court in the *Momand* case granted the motion for the trial of this issue of estoppel by judgment in advance of other issues, as being in furtherance of convenience, as provided for in Rule 42 (b) of the Federal Rules of Civil Procedure.

In our present case the necessity of any trial on the issues of *fact* involved in the defense of *res adjudicata* had been obviated as a result of the stipulation entered into following the pre-trial hearing, so that determination of the issue of law was properly authorized at the time the motion for summary judgment was presented by virtue of the provisions of Rule 42 of the New Federal Rules. In Vol. 3 of Moore's Federal Practice the following statements appear on page 3051:

“This principle of separate trial has also been applied as to legal and equitable issues. It may also be desirable in many situations to hold a hearing in advance of the main trial on certain defenses, especially those going to jurisdiction and venue. Another example would be where the defendant to a patent infringement action pleaded license and invalidity of the patent. If the license defense is tried in advance of the issue of validity and is decided in favor of the defendant, the necessity of trying the much more complicated issue of validity is avoided, unless, of course, the lower court is reversed on appeal. The same would often be true as to defenses of the statute of limitations or the statute of frauds, which might be tried advantageously before the balance of the case.”

See also:

Karolkiewicz v. City of Schenectady,
28 Fed. Supp. 343;

Momand v. Paramount Pictures Dist. Co.,
36 Fed. Supp. 568, at 571.

The effect and function of the presentation of the motion for summary judgment was to request the court to decide the defense of *res adjudicata* as a matter of law at that time, as authorized by Rule 42.

In the case of *Eberle v. Sinclair Prairie Oil Co.*, 35 Fed. Supp. 296, affirmed 120 Fed. (2d) 746, following the filing of the complaint, defendant filed both a motion to dismiss and a motion for summary judgment. Each of these motions was based upon the defense of *res adjudicata* because of proceedings had in the state court, copies of which were attached to the motions. On the hearings upon these motions, plaintiff's attorney, in response to a question by the court, admitted the proceedings had in the state court as set forth in the motions. The court held that since a motion to dismiss was directed solely to the allegations in the complaint and to those allegations alone, the

motion to dismiss would not be granted. The court did, however, grant the defendants' motion for summary judgment on the basis of the plaintiff's admission of the state court proceedings, thus disposing of the case.

For other cases where summary judgments have been granted on the basis of a defense of *res adjudicata* see:

Billings Utility Co. v. Advisory Committee,
135 Fed. (2d) 108;

Mitchell v. Village Creek Drainage District,
158 Fed. (2d) 475.

(c) *The Action in the Montana Court was commenced Prior to this action and final Decree entered prior to any Decree herein.*

Appellant herein filed her individual action to quiet title in the Federal court below on February 16th, 1942 (Record page 2). It appears from the Pleading Supplemental to Answer (and is admitted by Appellant's stipulation as aforesaid) that on April 12, 1941, Sherburne Mercantile Company (one of Appellees herein) filed an action in the District Court of the Ninth Judicial District of the State of Montana, in and for the County of Glacier, to quiet title to this same real estate, and that Mabel Monroe Bonds (the Appellant herein) was named as a defendant therein (Record pages 68-69). It is interesting to note that Appellant filed her action in federal court the *day before* the case before the Montana court came on for *trial and hearing on the merits*, on February 17, 1942 (Record page 118).

Both of these actions were actions in *rem*, involving the same subject matter and these same parties.

On June 15th, 1942, the Montana District Court rendered its judgment quieting title to the lands here in question in Sherburne Mercantile Company; the Decree

adjudging Sherburne Mercantile Company to be the true and lawful owner of the property, quieting its title as against all claims, demands or pretensions of the defendant Mabel Monroe Bonds, decreeing any claims of Mabel Monroe Bonds to the property to be invalid and groundless, and perpetually enjoining Mabel Monroe Bonds from setting up any claims thereto (Record pages 205-206). Appellant Mabel Monroe Bonds appealed that Decree to the Supreme Court of Montana (Record page 214), which on February 10th, 1944, affirmed the Decree (Record pages 62-64). No petition for rehearing was filed by said Appellant within the ten days allowed by the rules of the Supreme Court of Montana, or at all, and on February 28th, 1944, the Supreme Court of Montana issued its remittitur affirming the Decree of the District Court, which said remittitur was received and filed by the Clerk of said District Court on March 1, 1944 (Record page 59-60). The time for appeal to or application for writ of *certiorari* from the Supreme Court of the United States had long since expired and the Decree and Judgment of said Montana District Court had become and was a final judgment at the time the Pleading Supplemental to Answer was filed in the court below on December 13th, 1944 (Record page 59).

Since the action in the state court was filed April 12, 1941, and the present action was filed in Federal court on February 16, 1942, the state court, having "possession" of the *res*, had the full power to determine all controversies with respect thereto. (See Montgomery's Manual of Federal Jurisdiction and Procedure (4th Ed.) page 75, Sec. 104).

Furthermore, since the Judgment in the state court became final prior to any judgment in the court below and was pleaded therein, it constitutes *res adjudicata*. (See Montgomery's Manual of Federal Jurisdiction and Procedure (4th Ed.) page 76, Sec. 105).

(d) *The Montana Court had jurisdiction to render the Decree quieting title.*

The record considered in the Montana court (Exhibit "B" to the Pleading Supplemental to Answer; Record pages 65 ff) shows, among other things, that a fee patent issued from the United States to Mabel H. Monroe (now Mabel Monroe Bonds) dated December 12, 1918 (Record page 159), and it further shows that in 1919 she wrote for the patent (Record pages 173, 178-179), that a receipt therefor, dated September 25th, 1919, was signed "Mabel H. Monroe" (Record page 170), and that the mortgage, the foreclosure of which resulted in Sheriff's Deed to Sherburne Mercantile Company, was given October 13, 1920 (Record page 129). In other words, the Montana court was dealing with a case involving an action to quiet title to land situate in Montana where a fee patent had issued. Under these circumstances, it had jurisdiction. The action was to quiet title under the provisions of Section 9479 of the Revised Codes of Montana of 1935 (relevant portions are set out in the Appendix).

In 42 Corpus Juris Secundum "Indians," on pages 811-812, it is stated:

" * * * Where, however, the trust affecting, and the restriction on alienation of, land allotted to an Indian have been terminated by the issuance of a fee simple patent, pursuant to the provisions of 25 USCA, Sec. 349, all questions relating to title become subject to examination and determination by the courts of the

state in which the land is situated, which otherwise have jurisdiction. * * * ”

See also:

People v. Pratt, 26 Cal. App. (2d) 618,
80 Pac. (2d) 87;

Milne v. Leiphart (Mont.) 174 Pac. (2d) 805.

Since the patent had issued and the land was located in Montana, the state court had jurisdiction of the subject matter.

In the case of *United States v. Candelaria*, 291 U. S. 432, 70 L. Ed. 1023, the court, after stating that a decree of a New Mexico court quieting title to Indian lands would not bind the United States, since it was not a party, went on to hold:

“ * * * our answer to the question [i.e. did the New Mexico court have jurisdiction] is that the state court had jurisdiction to entertain the suit and proceed to judgment or decree. Whether the outcome would be conclusive on the United States is sufficiently shown by our answer to the first question.”

Appellant Mabel Monroe Bonds appeared in the action in the Montana state court on May 7th, 1941 (Record page 70), and in fact, in her answer she included a “counterclaim” claiming that title to the land should be quieted in her (Record page 92), thereby submitting her own claim of title to that court, as she was entitled to under Article III, ss. 6 of the Montana Constitution (See Appendix).

(e) *The fact that Appellant is an Indian or that Construction of Federal laws relating thereto might be involved did not defeat the jurisdiction of the Montana Court.*

The fact that Mabel Monroe Bonds is an Indian does not confer exclusive jurisdiction on the Federal court; an Indian has no right to insist that a cause be tried only

in Federal court simply because he is an Indian, and this is true as to unnaturalized Indians as well as to those who are citizens. See Vol. 4, Hughes Federal Practice, Jurisdiction and Procedure, Sec. 2321, page 96 and Note 99; *U. S. v. Waldo*, 294 Fed. 111; affirmed 269 U. S. 13; *Snyder v. Fancher*, 7 Fed. Supp. 597; *Button v. Snyder*, 7 Fed. Supp. 597; *Deere v. St. Lawrence River Power Company*, 32 Fed. (2d) 550.

Such a case is not a case wherein the Federal courts are given exclusive jurisdiction by statute. (See 28 U.S.C. A. Sec. 371).

Also the mere fact that the case might involve a federal question so that the Federal Court would have jurisdiction to entertain it, does not deprive the Montana court of concurrent jurisdiction.

See Montgomery's Manual of Federal Jurisdiction and Procedure (4th Ed.) page 74, Sec. 102; page 75, Sec. 103; and page 77, Sec. 106.

That is the holding in the citations from Montgomery. That is the holding in numerous cases collected in 28 U.S.C.A. Sec. 41 (1). Note 404, on page 154, also Note 404 on page 144 of the 1947 Appendix. And specifically with regard to Indian affairs, and treaty and constitutional rights, that is the holding in *U. S. v. Tyler*, 296 U. S. 13, 70 L. Ed. 138, where the court says on page 143 of Lawyer's Edition:

“ * * * insofar as they involve treaty or constitutional rights, those courts are as competent as the Federal courts to decide them. In the regular and ordinary course of procedure, the power of the highest state court in respect of such questions should first be exhausted. When that has been done, the authority of this court may be invoked to protect a party against

any adverse decision involving a denial of a Federal right properly asserted by him.”

The reason for the rule becomes immediately apparent from this quotation. If a litigant in the state court is improperly denied a Federal right, he can take his case to the Supreme Court of the United States for relief. That is the most he can do if denied the right in a lower Federal court. The ultimate protection of Federal rights rests in the same body, the United States Supreme Court, whether the action is prosecuted in a state court or a Federal District Court.

From the foregoing it is apparent that the Decree quieting title in favor of Appellee Sherburne Mercantile Company against Appellant herein as to the land here involved, was a final Decree rendered within jurisdiction of the state court in a suit commenced prior to the institution of the suit in the lower Federal court and becoming final before any Decree had been rendered by the Federal lower court.

(f) *The Decree and Judgment of the Montana Court was rendered on the merits, and Appellant, by answer and counterclaim raised therein the issues she raises herein.*

There can be no question that the judgment rendered by the Montana court was rendered on the merits and after consideration of the same issues raised in the federal court. We refer the court to Exhibit B, attached to the Supplemental Pleading, which is a copy of the complete transcript of the state district court proceedings in the case. (Record pages 65-215).

In order to clarify for this court some of the matters considered in the Montana court, we call its attention to the following, the Record page reference in each case re-

ferring to matters appearing in Exhibit B attached to the Supplemental Pleading:

(a) In her amended answer and cross-complaint Mabel Monroe Bonds, after denying plaintiff's title, set up five separate defenses alleging invalidity of the note and mortgage and the foreclosure proceedings based thereon, and likewise a counterclaim wherein she affirmatively sought to have title quieted in herself. (Record pages 71-94).

(b) At the opening of the trial, she sought and obtained permission to file additional separate defenses seven and eight (Record page 119). The seventh defense alleged that Mabel Monroe Bonds as an Indian ward received a trust patent under Section 348 of Title 25 U.S.C.A., that Sherburne Mercantile Company, without her knowledge or consent, had a fee patent issued to her, and then took a mortgage which was later foreclosed; and that under sections 331-334, 336 and 348 of Title 25 U.S.C.A., the fee patent and mortgage were fraudulent as well as under sections 352a and 352b of the same Title. (Record pages 107-112). The eighth defense alleged substantially the same things, and additionally attacked the validity of the foreclosure proceedings and alleged the mortgage to be null and void because the land was held in trust and because the obligation accrued before fee patent issued, thereby contravening section 354 of Title 25 U.S.C.A. (Record pages 112-117). She again prayed that she be decreed to be the owner of the land. (Record page 117).

(c) At the trial a Judgment Roll in an action conducted in the Montana District Court for Glacier

County wherein Sherburne Mercantile Co. (the Appellee herein) was plaintiff and Mabel H. Monroe (now Mabel Monroe Bonds, the Appellant herein) was a defendant was first introduced in evidence (Record pages 121-145). The Judgment and Decree rendered November 16, 1922, found that the land there involved (the same as the land here involved) had been mortgaged by said Mabel H. Monroe to said Sherburne Mercantile Co. on October 13, 1920, to secure a note of even date and decreed the foreclosure thereof (Record pages 141-145). Incidentally, the Judgment Roll sets forth an Answer verified by Mabel H. Monroe before a Notary Public (Record pages 139-140). Evidence showing a sheriff's sale of the premises pursuant to the Decree and the issuance of a Sheriff's Deed to the property dated December 20, 1923, to Sherburne Mercantile Company was then introduced (Record pages 147-159).

(d) Thereupon there was introduced in evidence a fee patent covering the land there and here involved issued by the United States to said Mabel H. Monroe dated December 12, 1918 (Record pages 159-161). It will be noted that this patent was issued long prior to the mortgage so foreclosed which was given on October 13, 1920.

(e) Defendants' case was thereupon put in (Record pages 162-186). In the course thereof a trust patent dated February 28, 1918, was put in evidence (Record pages 166-168). Likewise there was put in evidence a receipt for the *fee* patent, dated Sept. 25, 1919, and signed "Mabel H. Monroe." (Record page 170). Mabel Monroe Bonds testified; and, with regard to the fee

patent, stated that she had heard patents were being issued and wrote for hers in 1919 (Record page 173) and her letter was introduced (Record page 179).

(f) The defendant, Mabel Monroe Bonds, filed proposed findings of fact and conclusions of law embracing the issues of trust patent, "forced" fee patent, Indian ward, etc. etc. (Record pages 207-212).

The foregoing references to the transcript in the Montana State Court proceedings are made, not with any idea that this court (or the federal court below) should pass upon their merits (the Montana court did that), but as demonstrating that the cause which the plaintiff here is now trying to try in the federal court has already been tried on its merits in the state court.

It is apparent from the foregoing references to the record in the Montana court, that the issues and questions presented by the Appellant in the federal court, were by her presented to and considered by the Montana court. Such issues were not limited to mere consideration of the validity of the note and mortgage and the foreclosure proceedings alone, but embraced also the questions of the validity of the fee patent and the other matters raised herein relating to the federal laws concerning Indians as well.

The fact that Appellant was a defendant in the state court action and a plaintiff in the federal court action subsequently filed does not alter the situation:

30 Am. Jur. "Judgments" p. 935, says:

"In a particular case, the same circumstances may constitute a defense to a cause of action as well as sufficient basis for the interposition of a counterclaim or the maintenance of an independent cause of action. On the theory that a party may not recover in an independent action on a claim which he failed to interpose

in a prior action by way of setoff or counterclaim, but which was necessarily adjudicated by the former judgment, it is generally held that a subsequent independent action for affirmative relief is barred by a judgment in a prior action in which the matter forming the basis for the claim for relief was interposed as a defense."

As a matter of fact, as we have seen, Appellant in the state court action did ask affirmatively for a decree quieting title in her.

Finally, since both the state court action and the federal court action were actions to quiet title, it is not necessary that Appellant should actually have raised all the issues and claims in support of her alleged title in order for the Montana judgment to be conclusive; it is sufficient that in that action such issues or claims *could* have been raised therein:

34 Corpus Juris "Judgments" p. 959, says:

"h. Action to Quiet Title. In this form of action all matters affecting the title of the parties to the action may be litigated and determined, and the judgment is final and conclusive, and cuts off all claims or defenses of the losing party going to show title in himself, from whatever source derived, and which existed at the time of the suit, whether pleaded therein or not. * * * ."

See also:

Fulsom v. Quaker Oil & Gas Co.,
28 Fed. (2d) 398, aff'd;
35 Fed. (2d) 84.

(g) *The Montana Judgment and Decree was not based entirely on statutes of repose, as Appellant contends.*

Appellant contends that the decree of the Montana state court quieting title in favor of Sherburne Mercantile Company was based entirely on statutes of repose (see Appellant's Brief pages 25-27). In answer we refer the court to the findings of fact and conclusions of law made by

that court (Record pages 197-198). We particularly refer the court to Finding of Fact number 2 as follows:

"2. That Plaintiff is now, and ever since the *20th day of December, 1923*, has been, the owner and entitled to the possession of the lands described in Plaintiff's Complaint." (Record page 197).

As we have pointed out, the record showed a fee patent issued to Mabel Monroe Bonds on December 12, 1918, a mortgage given October 13, 1920, a foreclosure thereof thereafter had and Sheriff's Deed issued to Sherburne Mercantile Company *on December 20, 1923*. Obviously, a finding that Sherburne Mercantile Company was the owner since December 20, 1923, could not be based on laches, statutes of limitation or adverse possession (the period in Montana is 10 years plus payment of taxes; see Sections 9015, 9016, 9017, 9018, 9019 and 9024 Revised Codes of Montana of 1935, set forth in full in the Appendix hereto).

Also we point out Conclusion of Law number 5:

"5. That Plaintiff is entitled to a decree quieting its title to the lands described in Plaintiff's Complaint and forever enjoining and debarring Defendants, and each and all of them, from asserting any claim whatsoever in or to said lands, or any part thereof." (Record page 198).

In her brief Appellant argues that Conclusion of Law number 5 is based on the preceding four conclusions. This, of course, cannot be so, since conclusions of law are not based on conclusions of law, but upon findings of fact. Finding of Fact number 2 fully supports Conclusion of Law number 5.

Other findings of fact and conclusions of law do relate to adverse possession and laches and thereby provide *additional* bases for the decree in favor of Sherburne Mercantile Company, but they are in addition to the finding of ownership since December 20, 1923, as aforesaid, which finding necessarily must be based on the fact that the fee patent was validly issued and the foreclosure proceedings validly had so that the Sheriff's Deed issued on that date vested good title in Sherburne Mercantile Company as against all claims of Mabel Monroe Bonds.

(h) *Even a Decree based solely on conclusions of adverse possession and laches would be valid and binding on Appellant.*

Furthermore, even if the Decree were based solely upon conclusions of adverse possession and laches, that would necessarily imply findings and conclusions that a valid fee patent had issued. In other words, under the issues raised by the pleadings and proof in the case as tried in the state court, the court, in order to find adverse possession had run and laches had occurred, would of necessity have decided that a valid fee patent had issued so as to start the necessary periods running.

Thus in 2 Corpus Juris "*Adverse Possession*" p. 219, Sec. 458, it is said:

"C. Indians or Their Grantees. There can be no adverse possession of land prior to the extinguishment of the Indian title, and where land which has been allotted to Indians by the United States is held by an Indian title, that is, where the title is vested in the United States and an Indian, so that there can be no alienation by the latter without the consent of the United States, no title by adverse possession can be acquired in the land. *But where the title of the Indian is coupled with the power of unrestricted alienation the land is subject to the operation of the statute.*" (Italics ours)

Note 81 (a) to the foregoing section reads as follows:

"Where restrictions on alienation are removed and the Indian possesses an unencumbered title in fee simple, he is chargeable with the same diligence in beginning an action for the recovery of land to which he has title as other persons having title to lands. *Schrimpscher v. Stockton*, 183 U. S. 290, 22 S. Ct. 107, 46 L. Ed. 203."

This rule is repeated in *Vol. 2 Corpus Juris Secundum Adverse Possession*" page 515, Sec. 5 a, where it is said:

"Indians or Their Grantees. There can be no adverse possession of land while the title remains in Indian tribes. Where title to land which has been allotted to an Indian is vested in the United States and the Indian and there can be no alienation by the latter without the consent of the United States, no title by adverse possession can be acquired in the land; *but where the title of the Indian is coupled with the power of unrestricted alienation, the land is subject to the operation of the statute.*" (Italics ours).

This is confirmed by the following quotation from *United States v. Brooks*, 32 Fed. Supp. 422, at page 427 (D.C. Ind., 1940):

"An Indian who has obtained patent in fee to his allotment not only is a citizen of the United States, but has all the rights, privileges and immunities of citizens of the United States and is subject to the civil and criminal laws of the state. He is no longer a ward of the government. *State v. Big Sheep*, 1926, 75 Mont. 219, 243 P. 1067."

(i) *The Opinion of the Supreme Court of Montana.*

In the Montana proceedings, Appellant appealed from the judgment of the lower court to the Supreme Court of Montana. As appears from its opinion (Record page 62): (also see *Sherburne Mercantile Co. v. Bonds*, 115 Mont. 464, 145 Pac. (2d) 827), her Bill of Exceptions was stricken from the record on appeal for the reason it

was not presented for settlement within the time allowed by law.

The Montana statute (Section 9390 Revised Codes of Montana 1935; the relevant portions being set out in the Appendix hereto) imposes the affirmative duty on the party appealing from the judgment to present the bill for settlement within a prescribed time.

A bill not presented for settlement in time is a nullity and cannot be considered on appeal, even though counsel agree as to its consideration.

O'Donnell v. City of Butte,
72 Mont. 449, 235 Pac. 707.

Therefore, the Supreme Court was necessarily limited to reviewing the record which Appellant had caused to be presented.

The Montana district court, as we have seen, considered the matter fully on its merits. Appellant, by properly pursuing the necessary procedural steps, could have presented the full record to the Montana Supreme Court for consideration and review, but failed to do so. That failure gives no foundation for now contending that the Montana proceedings were not on the merits. The Supreme Court of Montana passed upon and decided all matters which Appellant's appeal and record thereof placed before it for decision and it could pass upon.

2. APPELLANT'S AUTHORITIES

We do not intend to go into a detailed analysis of the authorities cited by Appellant, as we believe that the foregoing sets forth the correct approach to the questions presented, and the authorities supporting the same.

As we have pointed out, the fundamental basis of Appellant's claim is that the fee patent issued to her was

"forced," so that the trust status of the land remained unchanged. But the United States is an indispensable party to a proceeding to avoid the fee patent and establish the trust status of the land. Therefore cases cited by Appellant where the *United States* has accomplished such a result are not authority for the contention that Appellant, suing as an individual, can accomplish the same result. We refer particularly to cases such as *United States v. Glacier County*, 17 Fed. Supp. 411, aff'd 99 Fed. (2d) 733; *United States v. Ferry County*, 24 Fed. Supp. 399; *United States v. Frisbee*, 57 Fed. Supp. 299; *United States v. Sherburne Mercantile Co.*, 68 Fed. (2d) 155; and *United States v. Candelaria*, 271 U. S. 432, 70 L. Ed. 1023.

Appellant likewise contends that the motion for summary judgment *admitted* all the proceedings and evidence in the transcript of the state court proceedings to be true (Appellant's Brief page 18). In the first place, the motion was not a motion for judgment on the pleadings, but was addressed simply to the proposition that the state court proceedings (stipulated by Appellant to have occurred as pleaded) were *res adjudicata* as a matter of law; and in the second place, the only "admission" would be that those proceedings had been had and that that evidence had been introduced in the state court and that the state court had rendered its said judgment and decree based thereon.

As we have seen, Appellant in the state court proceeding was entitled to raise, and in fact did raise, all questions which she raises in her federal court action, including the questions relating to forced fee and trust patents. In the state court action, the Supreme Court of the United States was available to her as a final arbiter, in the event

any federal rights of hers should be violated, just as it was to *Marchie Tiger* in the case of *Tiger v. Western Inv. Co.*, 221 U. S. 286, 55 L. Ed. 738 (cited on page 36 of Appellant's Brief), where the action arose in the Oklahoma State court, went to the United States Supreme Court, and was remanded to the Supreme Court of Oklahoma for proceedings in accordance with the United States Supreme Court's opinion.

We can see no basis for contending that Appellant was in any way deprived of a full and fair trial on the merits when the case was tried in the Montana court and believe that any doubt on this can be resolved by reading the transcript of the proceedings had in that case (Record pages 65-215).

CONCLUSION

It is respectfully submitted that the judgment of dismissal entered by the court below was correct as entered on the basis that the final decree and judgment of the Montana court is *res adjudicata* in this action.

It is further respectfully submitted that this action must be dismissed for lack of an indispensable party and federal jurisdiction.

ART JARDINE

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APPENDIX

REVISED CODES OF MONTANA OF 1935

9015. Seizin within ten years—when necessary in actions for real property—action for dower. No action for the recovery of real property or for the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the property in question within ten years before the commencement of the action. No action for the recovery of dower can be maintained by a widow unless the action is commenced within ten years after the death of her husband.

9016. Such seizin, when necessary in action or defense arising out of title to or rents of real property. No cause of action, or defense to an action, arising out of the title to real property, or to rents or profits out of the same, can be effectual, unless it appear that the person prosecuting the action, or making the defense, or under whose title the action is prosecuted or the defense is made, or the ancestor, predecessor, or grantor of such person, was seized or possessed of the premises in question within ten years before the commencement of the act in respect to which such action is prosecuted or defense made.

9017. Entry on real estate. No entry upon real estate is deemed sufficient or valid as a claim, unless an action be commenced thereupon within one year after making such entry, and within ten years from the time when the right to make it descended or accrued.

9018. Possession — when presumed — occupation deemed under legal title, unless adverse. In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the property is presumed to have been possessed thereof within the time required by law, and the occupation of the property by any other person is deemed to have been under and in subordination to the legal title, unless it appear that the property has been held and possessed adversely to such legal title for ten years before the commencement of the action.

9019. Occupation under written instrument or judgment—when deemed adverse. When it appears that the occupant, or those under whom he claims, entered into the possession of the property under claim of title, exclusive of other right, founding such claim upon a written instrument, as being a conveyance of the property in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the property included in such instrument, decree, or judgment, or of some part of the property, under such claim, for ten years, the property so included is deemed to have been held adversely, except that when it consists of a tract divided into lots, the possession of one lot is not deemed a possession of any other lot of the same tract.

9024. Occupancy and payment of taxes necessary to prove adverse possession. In no case shall adverse possession be considered established under the provision of any section or sections of this code unless it shall be shown that the land has been occupied and claimed for a period of ten years continuously, and the party or persons, their predecessors and grantors, have, during such period, paid all the taxes, state, county, or municipal, which have been legally levied and assessed upon said land.

9390. Exceptions not presented at time of ruling—notice to adverse party, how settled upon, etc. Whenever a motion for a new trial is pending, no bill of exceptions need be prepared or settled until the decision of the court upon motion for a new trial has been rendered, but a bill shall be prepared and settled in the same manner and within the same length of time after the decision on the motion for a new trial as is hereinafter provided for the making and settling of bills of exceptions. Except as above provided, the party appealing from a final judgment, if he desires to present on appeal the proceedings had at the trial, must, within fifteen days after the entry of judgment if the action was tried with a jury, or after receiving notice of the entry of judgment if the action was tried without a jury, or within such further time as the court or judge thereof may allow, not to exceed sixty days, except upon affidavit showing the necessity for further time, prepare and file with the clerk of the court and

serve upon the adverse party a bill of exceptions, containing all of the proceedings had at the trial upon which he relies, in which bill the evidence shall, unless otherwise prescribed by a rule of the supreme court, be stated in narrative form, except that the particular portion of the record showing objections to the admission or rejection of testimony upon which the party preparing the bill expects to rely, shall be set out verbatim. * * * * *

9479. Actions to quiet title to real property—parties—venue. An action may be brought and prosecuted to final decree, judgment, or order, by any person or persons, whether in actual possession or not, claiming title to real estate, against any person or persons, both known and unknown, who claim or may claim any right, title, estate, or interest therein, or lien or encumbrance thereon, adverse to plaintiff's ownership, or any cloud upon plaintiff's title thereto, whether such claim or possible claim be present or contingent, including any claim or possible claim of dower, inchoate or accrued, for the purpose of determining such claim or possible claim, and quieting the title to said real estate.

CONSTITUTION OF MONTANA — ARTICLE III.

Sec. 6. Courts of justice shall be open to every person, and a speedy remedy afforded for every injury of person, property, or character; and that right and justice shall be administered without sale, denial, or delay.

No. 11786

United States
Circuit Court of Appeals
For the Ninth Circuit.

KANAME FUJINO,

Appellant,

vs.

TOM C. CLARK, Attorney General of the United
States,

Appellee.

Transcript of Record
In Two Volumes
VOLUME I
Pages 1 to 264

Upon Appeal from the District Court of the United States
for the Territory of Hawaii

FILED

APR 7 1948

PAUL P. O'BRIEN,
CLERK

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In the United States District Court for the
District of Hawaii

Civil No. 704

KANAME FUJINO,

Plaintiff,

vs.

TOM C. CLARK, Attorney General of the United
States, as successor to the Alien Property
Custodian,

Defendant.

CLERK'S STATEMENT

Time of Commencing Suit:

February 13, 1946, Complaint filed.

Names of Original Parties:

Kaname Fujino, Plaintiff.

James E. Markham as Alien Property Custodian, Defendant.

Dates of Filing Pleadings:

February 13, 1946, Complaint and Summons.

April 15, 1946, Answer.

May 6, 1946, Reply.

April 22, 1947, Decision.

June 5, 1947, Judgment.

Times When Proceedings Were Had:

October 31, 1946, Trial.

November 6, 1946, Further trial.

November 7, 1946, Further trial.

November 8, 1946, Further trial.

November 15, 1946, Further trial.

Proceedings in the above entitled matter were had before the Honorable J. Frank McLaughlin,

Judge, United States District Court, District of Hawaii. [2]

Dates of Filing Appeal Documents:

August 30, 1947, Appearance (Attorney on Appeal).

Notice of Appeal to Circuit Court of Appeals under Rule 73(b).

October 2, 1947, Designation of Record on Appeal.

Bond on Appeal.

Order Enlarging Time to Docket Record on Appeal.

Certificate of Clerk to the Above Statement

United States of America,
District of Hawaii—ss.

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the District of Hawaii, do hereby certify the foregoing to be a full, true and correct statement showing the time of commencement of the above-entitled cause, the names of the original parties, the dates when the respective pleadings were filed, the times when proceedings were had, the name of the judge presiding, and the dates when appeal pleadings were filed in the above-entitled cause.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 5th day of November, 1947.

[Seal] /s/ WM. F. THOMPSON, JR.,
Clerk, United States District Court, District of
Hawaii. [3]

In the United States District Court for the
Territory of Hawaii

October Term, 1945

Civil No. 704

KANAME FUJINO,

Plaintiff,

vs.

JAMES E. MARKHAM as

Alien Property Custodian,

Defendant.

COMPLAINT

To the Honorable the Judges of the United States
District Court for the Territory of Hawaii:

Kaname Fujino, a citizen of the United States of America, residing in Honolulu, City and County of Honolulu, Territory of Hawaii, brings this his bill of complaint against James E. Markham, as Alien Property Custodian, duly qualified and acting under the "Trading with the Enemy Act," as amended, alleges and shows:

First: That at all times hereinafter mentioned and since February 23, 1919, the Plaintiff, Kaname Fujino, was and now is, a citizen of the United States of America, having been born in Honolulu, City and County of Honolulu, Territory of Hawaii, on February 23, 1919.

Second: That Plaintiff is a permanent resident of said Honolulu, Territory of Hawaii, and has been a resident of said Territory of Hawaii since

the time of his birth, except for short periods of time as hereinafter mentioned, to-wit: That Plaintiff was temporarily absent from said Territory of Hawaii for a brief period of three or four months in 1925 when, [5] as an infant, he was taken by his mother to the Empire of Japan, where he remained for a period of approximately four months; and that said Plaintiff was again a visitor in Japan from August 7, 1934 to April 26, 1941, when he remained in Tokyo, Japan, for the purpose of and while attending school and that immediately upon graduation from school he departed from Japan on or about April 26, 1941, and returned to said Honolulu, Territory of Hawaii, and resumed his residence and domicile in the Territory of Hawaii on May 4, 1941; and that since said last mentioned date said Plaintiff has been and now is, a resident of said Honolulu, Territory of Hawaii.

Third: That except as above set forth said Plaintiff has been residing continuously within said Territory of Hawaii from the time of his birth up to the present, and Plaintiff has not been within a designated enemy country except as above mentioned, and said Plaintiff was not nor at any time has been, an "enemy" or any "ally of enemy" within the meaning and purview of those terms as used and defined in the Act of October 6, 1917, known as and hereinafter referred to as the "Trading with the Enemy Act," or in any Act amendatory thereof and supplemental thereto, or in any proclamation or executive order issued by the President of the United States.

Fourth: That said Plaintiff is not now and has not been, a "national" of any foreign country or any designated enemy country within the meaning and purview of that term as used and defined in the Act of October 6, 1917, known as the "Trading with the Enemy Act," as amended by Title III of the First War Powers Act, 1941, or in any Act amendatory thereof and supplemental thereto, or in any proclamation or executive order issued by the President of the United States, except insofar as the Plaintiff may have been considered a national [6] of Japan by reason of his temporary residence in Japan prior to April 26, 1941, as hereinabove set forth.

Fifth: That at all times since March 21, 1941, the Plaintiff was and now is, the sole owner of the real property more particularly described in Exhibit "A" of Vesting Order No. 2724, a photostatic copy of which is attached hereto, marked Exhibit "I" and made a part hereof.

Sixth: That at no time since March 21, 1941, has any individual, partnership, association, corporation, or any organization, other than the Plaintiff, Kaname Fujino, had or now has, any right, title or interest in and to said real property or any part thereof.

Seventh: That at no time since March 21, 1941, has Yotaro Fujino, father of the Plaintiff and the national of Japan mentioned in Vesting Order No. 2724 hereinafter mentioned, had or now has, any

right, title, interest, claim or equity in and to said real property or any part thereof.

Eighth: That Plaintiff did not, at any time since March 21, 1941, hold and Plaintiff does not now hold, title to said real property as a cloak for or for the use or benefit of said Yotaro Fujino or any other person, partnership, corporation, association, or any organization.

Ninth: That since March 21, 1941, said Plaintiff held the legal title to said real property for his own use and benefit and said Plaintiff now holds said real property for his (Plaintiff's) sole use and benefit.

Tenth: That heretofore, to-wit, on December 3, 1943, Leo T. Crowley as Alien Property Custodian issued Vesting Order No. 2724, a photostatic copy of which is hereto annexed and made a part hereof and marked Exhibit "I."

Eleventh: That on or about December 31, 1943, said Vesting Order No. 2724 was served upon said Plaintiff by an [7] agent or representative of said Leo T. Crowley as Alien Property Custodian: that said Defendant as such Alien Property Custodian, purporting to act pursuant to the authority vested in him by the "Trading with the Enemy Act" as amended and Executive Order No. 9095, as amended, wrongfully and illegally took from the Plaintiff the possession and control of said real property and wrongfully seized and vested said real property.

Twelfth: That Plaintiff was not acting or purporting to act, directly or indirectly, for the benefit of Yotaro Fujino on March 21, 1941, or on December 3, 1943, or on December 31, 1943; that in fact and in truth said Plaintiff has not been acting or purporting to act, directly or indirectly, for the benefit of Yotaro Fujino in connection with said real property since March 21, 1941; and that said Yotaro Fujino has not been the beneficial owner of said real property since March 21, 1941.

Thirteenth: That said Leo T. Crowley was, at the time of the issuance of said Vesting Order, the duly appointed Alien Property Custodian, purporting to act pursuant to the authority vested in him by the "Trading with the Enemy Act," as amended, and Executive Order No. 9095, as amended.

Fourteenth: That the Defendant, James E. Markham, is the successor in office of said Leo T. Crowley and is now the duly appointed, qualified and acting Alien Property Custodian.

Fifteenth: That said Leo T. Crowley, as Alien Property Custodian, the predecessor in office of said Defendant, James E. Markham, has, since the service of said Vesting Order upon said Plaintiff, wrongfully, illegally, and contrary to the rights of said Plaintiff as a citizen of the United States [8] of America and contrary to the law and to the Constitution of the United States of America, taken possession of said Plaintiff's real property and has assumed supervision, control and direction of said real property, and the said Defendant, James E.

Markham as Alien Property Custodian, as successor in office of said Leo T. Crowley, has taken over possession of said real property and the supervision, control and direction of same, and is now in possession of and has supervision, control and direction of same, and is now in possession of and has supervision, control and direction of said real property.

Sixteenth: That since the service of said Vesting Order upon said Plaintiff, said Leo T. Crowley as Alien Property Custodian and said Defendant, James E. Markham as his successor and as Alien Property Custodian, have collected the rents, issues and profits from said real property; that said Defendant, James E. Markham, is still collecting said rents, issues and profits.

Seventeenth: That said Plaintiff as heretofore and on the 27th day of March, 1944, duly made and filed with the Office of the Alien Property Custodian, at Washington, District of Columbia, through the Honolulu Office of said Alien Property Custodian, notice of his claim to said real property, under oath, and in such form and containing such particulars required by said Custodian, in conformity with and pursuant to the statutes, requirements and orders in such cases made and provided; and that no hearing has been granted in connection with said claim although request for such hearing was made in connection with said claim.

Eighteenth: That said Defendant, James E. Markham as Alien Property Custodian, has failed, neglected and refused to allow said claim as filed by said Plaintiff or to grant a hearing thereon; and said Defendant has failed, neglected and [9] refused to return the possession of said real property to said Plaintiff; and although requested to do so by the said Plaintiff, said Defendant has failed, neglected and refused to relinquish the supervision, control and direction of said real property.

Nineteenth: That said Plaintiff is informed and believes that said Defendant, James E. Markham as Alien Property Custodian, through his duly authorized representatives, agents and servants, has been and now is, attempting to sell and dispose of said real property.

Twentieth: That said proposed and threatened sale and disposition of said real property by the said Defendant as Alien Property Custodian is contrary to law and to the Constitution of the United States of America, and that said proposed or threatened sale is wrongful, illegal and contrary to the rights of said Plaintiff as a citizen of the United States of America and as owner of said real property.

Twenty-first: That the reasonable value of said real property was, at the time of the issuance of said Vesting Order, and now is, in excess of \$29,000.00

Twenty-second: That the aforesaid wrongful and illegal possession, supervision, control and direction of said real property by the said Defendant have caused and will cause irreparable damages to said Plaintiff.

Twenty-third: That said threatened sale of said real property by said Defendant, if carried out, will cause irreparable damages to said Plaintiff.

Twenty-fourth: That said Plaintiff has no adequate remedy at law.

Wherefore, Plaintiff prays that a summons be issued out of this Court, directed to said James E. Markham [10] as Alien Property Custodian, commanding him on a day certain, to appear and answer to this bill of complaint, and obey and perform such orders and decrees in the premises as to the Court may seem proper, and required by the principles of equity and good conscience; and

The Plaintiff prays that a decree be entered herein restraining the sale of said real property by the said Defendant, James E. Markham as Alien Property Custodian, as well as his representatives, agents, servants and employees, pending determination of this action, and that it be adjudged that the right and title in said real property are in said Plaintiff and that said Plaintiff is entitled to the immediate possession thereof and directing said Defendant to transfer and deliver to said Plaintiff said real property and to render a full, true and correct accounting of any moneys or rent received or collected by the Defendant in connection with the supervision, control and direction of said real

property and declaring that said Vesting Order No. 2724 issued by Leo T. Crowley as Alien Property Custodian and as the predecessor in office of the said Defendant, James E. Markham, is a nullity and of no effect.

The Plaintiff prays for such other, further and different relief as to the Court may seem equitable, just and proper.

Dated: Honolulu, T. H., February 7th, 1946.

/s/ KANAME FUJINO,

Plaintiff.

SMITH, WILD, BEEBE &
CADES,

By /s/ E. H. BEEBE,

Attorneys for Plaintiff.

Territory of Hawaii,
City and County of Honolulu—ss.

Kaname Fujino, being first duly sworn, on oath deposes and says:

That he is the Plaintiff named in the foregoing Complaint; that he has read the same, knows the contents thereof and that the same is true.

/s/ KANAME FUJINO.

Subscribed and sworn to before me this 11th day of February, 1946.

[Seal] /s/ FRIEDA H. ROBERT,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

My commission expires June 30, 1949. [12]

United States of America
Office of Alien Property Custodian
Vesting Order Number 2724

Re: Real properties, bank accounts and claims
owned by Yotaro Fujino

Under the authority of the Trading With the Enemy Act, as amended, and Executive Order No. 9095, as amended, and pursuant to law, the undersigned, after investigation, finding:

1. That the last known address of Yotaro Fujino, also known as Yootaro Fujino, is Tokyo, Japan, and that he is a resident of Japan and a national of a designated enemy country (Japan);
2. That Kaname Fujino, a citizen of the United States residing at Honolulu, Territory of Hawaii, is acting or purporting to act directly or indirectly for the benefit, or on behalf of, Yotaro Fujino, a national of a designated enemy country (Japan), who is at present within such designated enemy country, and that the said Kaname Fujino is a national of a designated enemy country (Japan);
3. That Yotaro Fujino is the beneficial owner of the real property described in subparagraph 5-a hereof, held in the name of Kaname Fujino, and that Yotaro Fujino is the owner of the property described in subparagraphs 5-b and 5-c hereof;
4. That Kaname Fujino is the record owner of the real property described in subparagraph 5-a hereof;

5. That the property described as follows:

- a. Real property situated in the City and County of Honolulu, Territory of Hawaii, particularly described in Exhibit A attached hereto and by reference made a part hereof, together with all hereditaments, fixtures, improvements and appurtenances thereto, and any and all claims for rents, refunds, benefits or other payments arising from the ownership of such property,
- b. All right, title, interest and claim of Yotaro Fujino in and to those two savings accounts in the Yokohama Specie Bank, Ltd., Honolulu, Territory of Hawaii, which are due and owing to, and held for Yotaro Fujino, in the names of Oahu Lumber & Hardware Company (Receiver's Claim No. 2083) and Oahu Junk Company, Ltd. (Receiver's Claim No. 2081), including but not limited to all security rights in and to any and all collateral for any and all of such accounts, and the right to enforce and collect the same, and
- c. Those certain promissory notes in the amounts of \$20,000, \$11,700 and \$11,700, executed on December 5, 1940, by Kaname Fujino, a minor, by Tokuichi Tsuda and Yasuo (Harry Y.) Tsutsumi, his attorneys in fact, Katsue Fujiaki and Shizue Maneki, respectively, which are now in the possession of Tokuichi Tsuda and Yasuo (Harry Y.) Tsutsumi, and any and all obligations evidenced by said

promissory notes, including but not limited to all security rights in and to any and all collateral (including the shares [13] of capital stock of Oahu Junk Company, Ltd. issued to Kaname Fujino, Katsue Fujieki and Shizue Maneki and pledged to secure the payment of the aforesaid notes) for any and all such obligations, and the right to enforce and collect such obligations, and the right to the possession of any and all notes, bonds, or other instruments evidencing such obligations, is property within the United States owned or controlled by nationals of a designated enemy country (Japan);

And determining that the property described in subparagraph 5-b hereof is necessary for the maintenance or safeguarding of other property (namely, that property described in subparagraph 5a hereof) belonging to the same national of the same designated enemy country and subject to vesting (and in fact vested by this Order) pursuant to Section 2 of said Executive Order;

And determining that to the extent Kaname Fujino is the owner of record of the real property described in subparagraph 5-a hereof, he is controlled by, or acting for or on behalf of, Yotaro Fujino, a national of a designated enemy country (Japan), who is a person within such country;

And further determining that to the extent that such nationals are persons not within a designated

enemy country, the national interest of the United States requires that such persons be treated as nationals of a designated enemy country (Japan);

And having made all determinations and taken all action, after appropriate consultation and certification required by law, and deeming it necessary in the national interest,

Hereby Vests in the Alien Property Custodian the property described in subparagraph 5-a hereof, subject to recorded liens, encumbrances and other rights of record held by or for persons who are not nationals of designated enemy countries, and

Hereby Vests in the Alien Property Custodian the property described in subparagraph 5-b hereof, subject to any and all valid claims of the Oahu Junk Company, Ltd. against the same, and

Hereby Vests in the Alien Property Custodian the property described in subparagraph 5-c hereof,

All such property so vested to be held, used, administered, liquidated, sold or otherwise dealt with in the interest, and for the benefit, of the United States.

Such property and any or all of the proceeds thereof shall be held in an appropriate account, or accounts, pending further determination of the Alien Property Custodian. This Order shall not be deemed to limit the power of the Alien Property Custodian to return such property or the proceeds thereof in whole or in part, nor shall this Order be deemed to indicate that compensation will not be

paid in lieu thereof, if and when it should be determined to take any one or all of such actions.

Any person, except a national of a designated enemy country, asserting any claim arising as a result of this Order may, within [14] one year from the date hereof, or within such further time as may be allowed, file with the Alien Property Custodian on Form APC-1 a notice of claim, together with a request for a hearing thereon. Nothing herein contained shall be deemed to constitute an admission of the existence, validity or right to allowance of any such claim.

The terms "national" and "designated enemy country" as used herein shall have the meanings prescribed in Section 10 of Executive Order No. 9095, as amended.

Executed at Washington, D. C., on December 3, 1943.

[Seal] /s/ LEO T. CROWLEY,
Alien Property Custodian.

I hereby certify that the within is a true and correct copy of the original paper on file in this office,
LEO T. CROWLEY,
Alien Property Custodian,

By /s/ JOHN W. WATSON,
Assistant Secretary for Records, Office of Alien
Property Custodian. [15]

EXHIBIT A

Re: Real property owned by Yotaro Fujino

All those tracts or parcels of land situated in the City and County of Honolulu, Territory of Hawaii, particularly described as follows:

First Parcel of Land

All that certain parcel of land (portion of the land described in Royal Patent 688, Land Commission Award 1239, Apana 2, to Pine) situate at Kapalama, Honolulu aforesaid, and thus bounded and described:

Beginning at the South corner of King Street and a lane leading to the Former Japanese Hospital, and running as follows:

1. S. $33^{\circ} 10'$ E. true 112 feet along King Street;
2. S. 63° W. true 150 feet along remaining portion of Apana 2, R. P. 688 to Pine;
3. N. $23^{\circ} 35'$ W. true 102 feet along Japanese Hospital;
4. Thence to the initial point, along lane 132.5 feet.

Containing an area of 15,000 square feet, or thereabouts, and being the land conveyed to the Mortgagor by Lam Shee, by deed dated August 3, 1926, and recorded in the Bureau of Conveyances at Honolulu in Book 842, page 4.

Second Parcel of Land

All that certain parcel of land (portion of the land described in Land Commission Award 2222, Apana 3, to Kapalu) situate at Kapalama, Honolulu aforesaid, and thus bounded and described:

Beginning at a 1" galvanized iron pipe, at the North corner of this lot and the west corner of

Lot No. 3, the coordinates of said point of beginning referred to Government Survey Trig. Station "Punchbowl" being 5142.6 feet north and 7246.2 feet west, and running by true azimuths and distances:

1. 334° 10' 114.8 feet along Lot 3 to a 1" galvanized iron pipe;
2. 62° 19' 107.9 feet along Lot 1 to a 1" galvanized iron pipe;
3. 146° 45' 115.2 feet along fence, along B. P. Bishop Estate to a 1" galvanized iron pipe;
4. 242° 19' 122.8 feet along fence along L. C. A. 1917, Apana 1, to Hiki, to Nieper, to the point of beginning.

Containing an area of 13,234 square feet, or thereabouts, and being the land conveyed to the Mortgagor by Sano Danjo, by deed dated March 1, 1923, and recorded in said Bureau in Book 671, page 319.

Third Parcel of Land

All that certain parcel of land (portion of the land described in Royal Patent 2082, Land Commission Award 2222, Apana 3 to Kapalu) situate at Kapalama, Honolulu aforesaid, and thus bounded and described:

Beginning at 1 in. galv. iron pipe, at the North corner of this lot and the East corner of Lot No. 3, the coordinates [16] of said point of beginning referred to City and County Survey Trig. Station "Punchbowl" being 5045.3' North and 7214.7' West and running by true azimuths and distances:

1. 334° 20' 115.4 feet along fence, along L.C.A. #1233 to Pine, to J. H. Schnack, to a post;

2. $61^{\circ} 24'$ 102.4 feet along L.A.C. #4455 Ap. 1 to Kaaloa, to a $1\frac{1}{4}$ in. galv. iron pipe in concrete;
3. $146^{\circ} 45'$ 117.7 feet along fence, along B. P. Bishop Estate to a 1 in. galv. iron pipe;
4. $242^{\circ} 19'$ 117.9 feet along Lots #2 and #3 to the point of beginning.

Containing an area of 12,810 square feet, or thereabouts, and being the land conveyed to the Mortgagor by Jirokichi Fujiyoshi, by deed dated October 5, 1933, and recorded in said Bureau in Book 1219, page 193.

Fourth Parcel of Land

All that certain parcel of land (portion of the land described in Royal Patent 1506, Land Commission Award 2319, Apana 2 to Nawai) adjoining the Kalihi Branch of the Oahu Railway & Land Co.'s 40 foot Right of Way, Southeasterly from Waiakamilo Road at Kapalama, Honolulu aforesaid, and thus bounded and described:

Beginning at a pipe at the South corner of this piece of land, on the Northeast side of the Oahu Railway and Land Company's 40 foot Right of Way (Kalihi Branch) the coordinates of said point of beginning referred to Government Survey Triangulation Station "Mokauea" being 5541.20 feet South and 1710.02 feet West and running by true azimuths:

1. $146^{\circ} 07'$ 60.22 feet along Oahu Railway and Land Company's 40 foot Right of Way (Kalihi Branch) to a pipe in concrete;
2. $155^{\circ} 40'$ 63.85 feet along Section "Z" of Land Court Application 750 to a pipe in concrete;
3. $243^{\circ} 02'$ 136.70 feet to a pipe in concrete;

4. 325° 00' 168.70 feet along Section "Y" of Land Court Application 750 to a pipe in concrete;
5. 78° 23' 161.62 feet to the point of beginning.

Containing an area of 21,224 square feet, or thereabouts, and being the land conveyed to the Mortgagor by Bishop Trust Company, Limited, Trustee, by deed dated January 28, 1933, and recorded in said Bureau in Book 1192, page 464.

Fifth Parcel of Land

All that certain parcel of land (portion of the land described in L. C. A. 7714-B, Apana 7 to Moses Kekuaiwa; R. P. 2145 L. C. A. 2319, Part 2, Apana 2 to Nawai) situate at Kapalama, Honolulu aforesaid, and bounded and more particularly described as follows:

Beginning at a point on the Easterly boundary of this piece of land and the Westerly side of the Oahu Railway and Land Company's 40-foot Right of Way, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Punchbowl" being 4,739.4 feet North, 7,605.9 feet West, and the true azimuth and distance to a 1¼ inch pipe set in concrete monument on the East line of L. C. A. 8515, Apana 1 to Keoni Ana, being 326° 07' 429.00 feet, and running by [17] true azimuths:

1. 81° 25' 20.30 feet along portion of Kapalama owned by the Andrews Estate;
2. 357° 10' 72.00 feet along same;
3. 333° 10' 98.50 feet along same;
4. 69° 15' 69.50 feet along L. C. A. 8515, Apana 1 to Keoni Ana to a pipe in concrete;

5. 151° 00' 96.00 feet along Kapalama to a pipe in concrete;
6. 66° 15' 134.00 feet along same to a pipe in concrete;
7. 161° 10' 62.50 feet along L. C. A. 1730, Apana 2, Kilauea;
8. 228° 00' 50.00 feet along same;
9. 136° 05' 55.00 feet along same;
10. 79° 20' 36.00 feet along same;
11. 152° 30' 50.00 feet along L. C. A. 1731, Apana 1, to Kaaua;
12. 241° 30' 52.00 feet along same;
13. 166° 00' 147.00 feet along same;
14. 245° 00' 130.00 feet along L. C. A. 1730, Apana 1, to Kilauea;
15. 326° 07' 283.00 feet along the Westerly side of the Oahu Railway and Land Company's 40-foot Right of Way to the point of beginning and containing an area of 1.63 acres, or thereabouts.

Being the land conveyed to the Mortgagor by Watson Ballentyne, by deed dated October 28, 1936, and recorded in said Bureau in Book 1348, page 261.

Sixth Parcel of Land

All that certain parcel of land situate at Kapalama, City and County of Honolulu, said Territory, described as follows:

Lot Twenty-five-C (25-C), area 3,028.0 square feet, of Section C, as shown on Map 3, filed in the Office of the Assistant Registrar of the Land Court of the Territory of Hawaii with Land Court Application No. 750 of the Trustees under the Will and of the Estate of Bernice P. Bishop, deceased, and being all of the land comprised in Transfer Certificate of Title No. 17,544 issued to the Mortgagor.

[Title of District Court and Cause.]

SUMMONS

To the above named Defendant:

You are hereby summoned and required to serve upon Smith, Wild, Beebe & Cades plaintiff's attorney, whose address is Bishop Trust Building, Honolulu, T. H., an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[Seal] WM. F. THOMPSON, JR.,
Clerk of Court.

By /s/ THOS. P. CUMMINS,
Deputy Clerk.

Date: February 13th, 1946.

Note—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

[Endorsed]: Filed Feb. 13, 1946. [19]

Territory of Hawaii,
City and County of Honolulu—ss.

Emmanuel U. Moses, Jr., being first duly sworn on oath deposes and says:

That at all times hereinafter mentioned he has been and now is Deputy United States Marshal, Territory of Hawaii;

That on the 13th day of February, 1946, in Honolulu, City and County of Honolulu, Territory of Hawaii, he duly served the Summons and Complaint in the above entitled cause upon James E.

Markham as Alien Property Custodian, Defendant above named, by handing to and leaving with James G. Hammond, Acting Manager, Honolulu Office, Alien Property Custodian, a certified copy of the Summons and Complaint, and then and there mailing a certified copy of said Summons and Complaint by registered mail to Tom C. Clark, Attorney General of the United States of America; and further that on the 14th day of February, 1946, in Honolulu, City and County of Honolulu, Territory of Hawaii, he duly served the Summons and Complaint in the above entitled cause upon Ray J. O'Brien, United States Attorney, District of Hawaii, by handing to and leaving with him a certified copy of the Summons and Complaint.

/s/ EMMANUEL U. MOSES, JR.

Subscribed and sworn to before me this 14th day of February, 1946.

[Seal] /s/ THOS. P. CUMMINS,

Deputy Clerk, United States
District Court, Territory of
Hawaii. [20]

RETURN OF SERVICE WRIT

United States of America,
District of Columbia—ss.

Re: Kaname Fujino v. James E. Markham as Alien
Property Custodian—Civil Action No. 704.

I hereby certify and return that I served the annexed summons and complaint on the therein-named defendant James E. Markham, Alien Property Custodian, by handing to and leaving a true and correct copy of said summons and complaint with said

James E. Markham personally at National Press Building in said District on the 5th day of March, A.D. 1946.

W. BRUCE MATTHEWS,

U. S. Marshal.

By /s/ EDGAR J. McCLOY,

Deputy.

[Registered article No. 39535 return receipt attached.]

[Title of District Court and Cause.]

ANSWER

For his answer to plaintiff's complaint, defendant states and alleges:

I.

He admits the allegations contained in paragraph first of the complaint.

II.

He is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph Second of the complaint.

III.

He is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph Third of the complaint.

IV.

He denies the allegations contained in paragraph Fourth of the complaint. [22]

V.

He denies the allegations contained in paragraph Fifth of the complaint.

VI.

He denies the allegations contained in paragraph Sixth of the complaint.

VII.

He denies the allegations contained in paragraph Seventh of the complaint.

VIII.

He denies the allegations contained in paragraph Eighth of the complaint.

IX.

He denies the allegations contained in paragraph Ninth of the complaint.

X.

He admits the allegations contained in paragraph Tenth of the complaint.

XI.

He denies the allegations contained in paragraph Eleventh of the complaint except that part thereof reading "That on or about December 31, 1943, said Vesting Order No. 2724 was served upon said Plaintiff by an agent or representative of said Leo T. Crowley as Alien Property Custodian," which he admits.

XII.

He denies the allegations contained in paragraph Twelfth of the complaint.

XIII.

He admits the allegations contained in paragraph Thirteenth of the complaint. [23]

XIV.

He admits the allegations contained in paragraph Fourteenth of the complaint.

XV.

He admits the allegations contained in paragraph Fifteenth of the complaint except that part thereof reading "wrongfully, illegally, and contrary to the rights of said Plaintiff as a citizen of the United States of America and contrary to the law and to the Constitution of the United States of America," which he denies.

XVI.

He admits the allegations contained in paragraph Sixteenth of the complaint.

XVII.

He admits the allegations contained in paragraph Seventeenth of the complaint, except denies that a notice of claim was "duly" filed.

XVIII.

He admits that he has not allowed plaintiff's claim and that he has refused to return the possession and relinquish the supervision, control and direction of the real property described in Exhibit "A" of Vesting Order No. 2724 attached to and made a part of the complaint as Exhibit "I" as alleged in paragraph Eighteenth, but denies each and every other allegation contained in said paragraph.

XIX.

He denies the allegations contained in paragraph Nineteenth of the complaint.

XX.

He denies the allegations contained in paragraph Twentieth of the complaint.

XXI.

He admit the allegations contained in paragraph Twenty-first of the complaint. [24]

XXII.

He denies the allegations contained in paragraph Twenty-second of the complaint.

XXIII.

He denies the allegations contained in paragraph Twenty-third of the complaint.

XXIV.

He denies the allegations contained in paragraph Twenty-fourth of the complaint.

For a First Separate and Complete Defense,
Defendant States and Alleges:

XXV.

That previous to March 21, 1941, the real and beneficial ownership of, and the record title to, the real property described in Exhibit "A" of Vesting Order N. 2724, attached to and made a part of the complaint as Exhibit "I," were in Yotaro Fujino, a citizen and resident of Japan.

XXVI.

That on February 20, 1941, Yotaro Fujino, by an instrument in writing, a true and correct copy of which is attached hereto as Exhibit "D" and made a part of this answer, made, constituted and appointed Tokuichi Tsuda and Yasuo Tsutsumi his attorneys in fact for the purposes and with the powers therein set forth.

XXVII.

That on March 21, 1941, contrary to their powers as set forth in said written instrument, and without other lawful authority, Tokuichi Tsuda and Yasuo Tsutsumi, purporting to act as attorneys in fact for Yotaro Fujino, purported to give, transfer and convey the said real property by an alleged deed of warranty, a true and correct copy of which alleged deed is hereto attached as Exhibit "B" and made a part of this answer, to plaintiff. [25]

XXVIII.

That by reason of said lack of authority, the alleged deed of warranty did not give, transfer or convey the ownership of the said real property to plaintiff, but the real and beneficial ownership of said real property continued to be in Yotaro Fujino.

For a Second Separate and Complete Defense,
Defendant States and Alleges:

XXIX.

That the purported gift, transfer and conveyance of said real property to plaintiff, and the subse-

quent recording of the alleged deed in the Bureau of Conveyances, Territory of Hawaii, as is shown by Exhibit "B" attached hereto, were to conceal and cloak the fact that notwithstanding said purported gift, transfer and conveyance and record of ownership, Yotaro Fujino, a national of a designated enemy country (Japan), living in said enemy country, was to remain, and did remain up to the time of Vesting Order No. 2724, the real and beneficial owner of said real property.

XXX.

That the purported gift, transfer and conveyances and record of ownership was effected by plaintiff, Yotaro Fujino, and his attorneys in fact, Tokuichi Tsuda and Yasuo Tsutsumi, in a conspiracy, and with the purpose and intent, to defraud and to continue to defraud the United States of America by concealing the identity of the true, real and beneficial owner of the said property, and thereby prevent seizure thereof in the event of war.

XXXI.

That the purported gift, transfer and conveyance and record of ownership was fictitious, sham and fraudulent and did not transfer ownership of the said real property to plaintiff, but on the contrary the real and beneficial ownership of said real property continued to be in Yotaro Fujino. [26]

For a Third and Separate and Complete
Defense, Defendant States and Alleges:

XXXII.

That at all times between March 21, 1941, and the date of Vesting Order No. 2724, plaintiff, with respect to said real property, acted directly or indirectly for the benefit of, or on behalf of, Yotaro Fujino, a national of a designated enemy country (Japan), then living within such designated enemy country, and plaintiff is therefore a national of a foreign country and of a designated enemy country (Japan) within the purview of the Trading with the Enemy Act, as amended, and Executive Order No. 9095, as amended, and as such has no standing to institute or maintain this action.

Wherefore, defendant prays that plaintiff's complaint be dismissed and that he recover his costs and disbursements.

/s/ RAY J. O'BRIEN,

United States Attorney for the Territory of Hawaii,
Honolulu, Hawaii.

/s/ JOHN F. SONNETT,

Assistant Attorney General.

/s/ HARRY LEROY JONES,

/s/ IRVING J. LEVY,

Special Assistants to the
Attorney General.

/s/ ROY C. FRANK,

Chief Trial Attorney, Claims Division, Department
of Justice, Washington, D. C.,

Attorneys for Defendant.

Office of the Assistant Registrar, Land Court, Territory of Hawaii (Bureau of Conveyances)

Honolulu, Hawaii, March 17, 1941.

The attached instrument is a true copy of Document Number 57281, received for registration in this office, March 17, 1941, at 2:33 o'clock p.m., and noted on Certificate of Title Number 3.

Attest:

[Seal] /s/ OLIVER R. AIU,

Assistant Registrar, Land
Court, Territory of Hawaii.

EXHIBIT "D"

Power of Attorney

Know All Men by These Presents:

That I, Yotaro Fujino, also known as Yootaro Fujino, formerly residing in Honolulu, City and County of Honolulu, Territory of Hawaii, but now residing in Tokyo, Japan, do hereby make, constitute and appoint Tokuichi Tsuda and Yasuo Tsutsumi, whose residence and post office address is 1217 North King Street, Honolulu, aforesaid, jointly, my true and lawful attorneys in fact for me and in my name, place and stead and for my use and benefit, to do all or any of the following acts and things, that is to say: To carry on and transact all my business in the Territory of Hawaii; to enter into, perform and carry out, and to rescind, terminate and cancel contracts of all kinds; to buy, take on lease and otherwise acquire, and to hold, sell, mortgage, hypothecate, pledge, lease and otherwise dis-

pose of, and in any and every way and manner deal with real property, leaseholds and other interests in real property, stocks, bonds, goods, wares, merchandise, choses in action and other property and rights of any nature whatsoever in possession or in action; to sign, seal, execute, acknowledge and deliver deeds, bills of sale, contracts, agreements, options, leases and other instruments; to transact my business with Bishop National Bank of Hawaii at Honolulu; to draw checks for the withdrawal of funds from said bank; to endorse checks, promissory notes, drafts, and bills of exchange for collection or deposit; to accept drafts and other negotiable instruments and to receive, endorse and negotiate and deliver bills of lading and other evidences and documents of title to merchandise, stock certificates and other securities; to waive demand, notice [28] and notice of protest of checks, bills, notes and other negotiable instruments; to borrow money from time to time upon such terms and at such rates of interest as my said attorneys shall deem property and expedient either without security or upon the security of all or any portion or portions of my property whether real, personal or mixed, and to give, make, sign, seal, execute, acknowledge and deliver promissory notes and other obligations, mortgages, pledge agreements, hypothecations and other securities and any such mortgage, pledge agreement or hypothecation may be with such powers of sale and/or foreclosure and may contain such other provisions, covenants and conditions as my said attorneys may agree to, and to execute all documents and writings of whatsoever kind and na-

ture in connection therewith; to collect, receive, enforce payment and collection of and otherwise reduce to possession, and receipt and give releases and discharges for all sums of money and other kinds of property whatsoever that may be due, payable or belonging to me, or to which I may be entitled to possession of; to remise, release and quit-claim to all my estate, right, title and interest including any curtesy in any property of whatsoever kind and nature; to give, make, sign, seal, execute and deliver such bonds, guaranty, indemnity or other agreements or undertakings as may be necessary or proper or convenient in connection with any of the transactions hereby authorized; and to vote at any and all meetings of stockholders any shares of stock which I may own on any and all questions that may come before such meetings.

And I hereby revoke those two certain powers of attorney heretofore made by me to my said attorneys, both dated February 12, 1935, one signed Yootaro Fujino and recorded in [29] the Bureau of Conveyances at Honolulu in Honolulu aforesaid, in Book 1270, Page 42, and the other signed Yotaro Fujino, recorded in said Bureau in Book 1357, Page 73.

Giving and granting unto my said attorneys jointly full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully to all intents and purposes as I might or could do if personally present, and to do any of said acts and things either for me alone and/or jointly with another or others, and with full power

of substitution and revocation; and I hereby ratify and confirm, and covenant to ratify and confirm, all that my said attorneys or any substitute or substitutes shall lawfully do or cause to be done by virtue of these presents.

In witness whereof, I have hereunto set my hand and seal this 20th day of February, 1941.

[Seal] /s/ YOTARO FUJINO [30]

Certificate of Acknowledgement of
Execution of Document

Empire of Japan, Prefecture of Tokyo, City of
Tokyo, Consulate General of the United States
of America.

I, Charles H. Stephan, Vice Consul of the United States of America at Tokyo, Japan, duly commissioned and qualified, do hereby certify that on this 20th day of February, 1941, before me personally appeared Yotaro Fujino, sometimes known as Yoo-taro Fujino, to me personally known, and known to me to be the individual described in, whose name is subscribed to, and who executed the annexed instrument, and being informed by me of the contents of said instrument, he duly acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and official seal the day and year last above written.

/s/ CHARLES H. STEPHAN,

Vice Consul of the United
States of America.

Service No. 732

American Consulate General Fee stamp \$2.00.

Office of the Assistant Registrar, Land Court, Territory of Hawaii (Bureau of Conveyances)

Honolulu, Hawaii, May 19, 1941.

The attached instrument is a true copy of Document Number 58404, received for registration in this office May 19, 1941, at 11:47 o'clock a.m., and noted on Certificate of Title Number, and from which Certificate of Title Number 24074 has been issued.

And also recorded in the Bureau of Conveyances in Liber 1638 Pages 423-427.

Attest:

/s/ OLIVER P. AIU,

Assistant Registrar, Land
Court, Territory of Hawaii.

EXHIBIT B

Transfer of Deed

Know All Men by These Presents:

That Yotaro Fujino (also known as Yootaro Fujino), whose wife's name is Chiyono Fujino, of Honolulu, City and County of Honolulu, Territory of Hawaii, Grantor, for and in consideration of the sum of One Dollar (\$1.00) to him in hand paid by his son, Kaname Fujino, an unmarried man, whose residence and post office address is 1217 North King Street, Honolulu aforesaid, Grantee, the receipt whereof is hereby acknowledged, and in further

consideration of the love and affection which the Grantor has for the Grantee, does hereby given, grant, bargain, sell and convey unto said Grantee, his heirs and assigns:

First: All that certain parcel of land (portion of the land described in Royal Patent 688, Land Commission Award 1239, Apana 2, to Pine) situate at Kapalama, Honolulu aforesaid, and thus bounded and described:

Beginning at the South corner of King Street and a lane leading to the former Japanese Hospital, and running as follows:

1. S. $33^{\circ} 10'$ E. true 112 feet along King Street;
2. S. 63° W. true 150 feet along remaining portion of Apana 2, R. P. 688 to Pine;
3. N. $23^{\circ} 35'$ W. true 102 feet along Japanese Hospital;
4. Thence to the initial point, along lane 132.5 feet.

Containing an area of 15,000 square feet, or thereabouts, and being the land conveyed to the Grantor by Lam Shee, by deed dated August 3, 1926, and recorded in the Bureau of Conveyances at Honolulu in Book 842, Page 4.

Second: All that certain parcel of land (portion of the land described in Land Commission Award 2222, Apana 3, to Kapalu) situate at Kapalama, Honolulu aforesaid, and thus bounded and described:

Beginning at a 1" galvanized iron pipe, at the North corner of this lot and the west corner of Lot No. 3, the coordinates of said point of beginning referred to Government Survey Trig. Station

“Punchbowl” being 5142.6 feet North and 7247.2 feet West, and running by true azimuths and distances:

1. $334^{\circ} 10'$ 114.8 feet along Lot 3 to a 1" galvanized iron pipe;
2. $62^{\circ} 19'$ 107.9 feet along Lot 1 to a 1" galvanized iron pipe;
3. $146^{\circ} 45'$ 115.2 feet along fence, along B. P. Bishop Estate to a 1" galvanized iron pipe;
4. $242^{\circ} 19'$ 122.8 feet along fence along L. C. A. 1917, Apana 1, to Hiki, to Nieper, to the point of beginning.

Containing an area of 13,234 square feet, or thereabouts, and being the land conveyed to the Grantor by Sano Danjo, by deed dated March 1, 1923, and recorded in said Bureau in Book 671, Page 319.

Third: All that certain parcel of land (portion of land described in Royal Patent 2082, Land Commission Award 2222, Apana 3 to Kapalu) situate at Kapalama, Honolulu aforesaid, and thus bounded and described:

Beginning at a 1 in. galv. iron pipe, at the North corner of this lot and the East corner of Lot No. 3, the coordinates of said point of beginning referred to City and County Survey Trig. Station “Punchbowl” being 5045.3' North and 7214.7' West and running by true azimuths and distances:

1. $334^{\circ} 20'$ 115.4 feet along fence, along L.C.A. #1239 to Pine, to J. H. Schnack, to a post;
2. $61^{\circ} 24'$ 102.4 feet along L.A.C. #4455 Ap. 1 to Kaaloa, to a $1\frac{1}{4}$ in. galv. iron pipe in concrete;
3. $146^{\circ} 45'$ 117.7 feet along fence, along B. P. Bishop Estate to a 1 in. galv. iron pipe;
4. $242^{\circ} 19'$ 117.9 feet along Lots #2 and #3 to the point of beginning.

Containing an area of 12,810 square feet, or thereabouts, and being the land conveyed to the Grantor by Jirokichi Fujiyoshi, by deed dated October 5, 1933, and recorded in said Bureau in Book 1219, Page 193.

Fourth: All that certain parcel of land (portion of the land described in Royal Patent 1506, Land Commission Award 2319, Apana 2 to Nawai) adjoining the Kalihi Branch of the Oahu Railway & Land Co.'s 40 foot Right of Way, Southeasterly from Waiakamilo Road at Kapalama, Honolulu aforesaid, and thus bounded and described:

Beginning at a pipe at the South corner of this piece of land, on the Northeast side of the Oahu Railway and Land Company's 40 foot Right of Way (Kalihi Branch) the coordinates of said point of beginning referred to Government Survey Triangulation Station "Mokauea" being 5541.20 feet South and 1710.02 feet West and running by true azimuths:

1. $146^{\circ} 07'$ 60.22 feet along Oahu Railway and Land Company's 40 foot Right of Way (Kalihi Branch) to a pipe in concrete;
2. $155^{\circ} 40'$ 63.85 feet along Section "Z" of Land Court Application 750 to a pipe in concrete;
3. $243^{\circ} 02'$ 136.70 feet to a pipe in concrete;
4. $325^{\circ} 00'$ 168.00 feet along Section "Y" of Land Court Application 750 to a pipe in concrete;
5. $78^{\circ} 23'$ 161.62 feet to the point of beginning.

Containing an area of 21,224 square feet, or thereabouts, and being the land conveyed to the Grantor by Bishop Trust Company, Limited, Trustee, by deed dated January 28, 1933, and recorded in said Bureau in Book 1192, Page 464.

Fifth: All that certain parcel of land (portion of land described in L. C. A. 7714-B, Apana 7 to Moses Kekuaiwa; R. P. 2145, L. C. A. 2319, Part 2, Apana 2 to Nawai) situate at Kapalama, Honolulu aforesaid, and bounded and more particularly described as follows:

Beginning at a point on the Easterly boundary of this piece of land and the Westerly side of the Oahu Railway and Land Company's 40-foot Right of Way, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Punchbowl" being 4,739.4 feet North, 7,605.9 feet West, and the true azimuth and distance to a 1¼ inch pipe set in concrete monument on the East line of L. C. A. 8515, Apana 1 to Keoni Ana, being 326° 07' 429.00 feet, and running by true azimuths:

1. 81° 25' 20.30 feet along portion of Kapalama owned by the Andrews Estate;
2. 357° 10' 72.00 feet along same;
3. 333° 10' 98.50 feet along same;
4. 69° 15' 69.50 feet along L. C. A. 8515, Apana 1 to Keoni Ana to a pipe in concrete;
5. 151° 00' 96.00 feet along Kapalama to a pipe in concrete;
6. 66° 15' 134.00 feet along same to a pipe in concrete;
7. 161° 10' 62.50 feet along L. C. A. 1730, Apana 2, Kilauea;
8. 228° 00' 50.00 feet along same;
9. 136° 05' 55.00 feet along same;
10. 79° 20' 36.00 feet along same;
11. 152° 30' 50.00 feet along L. C. A. 1731, Apana 1, to Kaaua;
12. 241° 30' 52.00 feet along same;
13. 166° 00' 147.00 feet along same;
14. 245° 00' 130.00 feet along L. C. A. 1730, Apana 1, to Kilauea;
15. 326° 07' 283.00 feet along the Westerly side of the Oahu Railway and Land Company's 40-foot Right of Way to the point of beginning and containing an area of 1.63 acres, or thereabouts.

Being the land conveyed to the Grantor by Watson Ballentyne, by deed dated October 28, 1936, and recorded in said Bureau in Book 1348, Page 261.

Sixth: All that certain parcel of land situate at Kapalama, City and County of Honolulu, said Territory, described as follows:

Lot Twenty-five-C (25-C), area 3,028.0 square feet, of Section C, as shown on Map 3, filed in the Office of the Assistant Registrar of the Land Court of the Territory of Hawaii with Land Court Application No. 750 of the Trustees under the Will and of the Estate of Bernice P. Bishop, deceased, and being all of the land described in Transfer Certificate of Title No. 17,544 issued to said Grantor.

To have and to hold the same, together with all buildings, improvements, rights, easements, privileges and appurtenances thereunto belonging or appertaining or held and enjoyed therewith, unto said Grantee, his heirs and assigns, forever; Subject, however, to that certain Mortgage made by the Grantor to Bishop National Bank of Hawaii at Honolulu, dated March 13, 1941, filed in the Office of the Assistant Registrar of the Land Court of the Territory of Hawaii as Document No. 57283 and noted on said Transfer Certificate of Title No. 17,544, and also recorded in the Bureau of Conveyances at Honolulu in Book 1626, Page 166.

And said Grantor does hereby covenant with said Grantee, that he is lawfully seised in fee simple of the granted property and has good right to grant and convey the same as aforesaid; that said prop-

erty is free and clear of all encumbrances, except as aforesaid; and that he will and his heirs, executors and administrators shall warrant and defend the same unto said Grantee, his heirs and assigns, forever, against the lawful claims and demands of all persons.

And for the consideration aforesaid, Chiyono Fujino, wife of said Grantor, does hereby release, remise and quit-claim unto said Grantee, his heirs and assigns, forever, all of her right, title and interest, by way of dower or otherwise, in/and to the said granted property.

In witness whereof, said Grantor and his wife have [35] hereunto set their hands and seals this 21st day of March, A. D. 1941.

YOTARO FUJINO

(Also Known as)

YOOTARO FUJINO,

By /s/ TOKUICHI TSUDA,

By /s/ YASUO TSUTSUMI,

His Attorneys-in-fact.

CHIYONO FUJINO,

By /s/ TOKUICHI TSUDA,

By /s/ YASUO TSUTSUMI,

Her Attorneys-in-Fact.

Territory of Hawaii,

City and County of Honolulu—ss.

On this 21st day of March, 1941, before me personally appeared Hokuichi Tsuda and Yasuo Tsutsumi, to me personally known, who, being by me

duly sworn, did say that they are the attorneys-in-fact of Yotaro Fujino (also known as Yootaro Fujino), duly appointed under Power of Attorney dated February 20, 1941 recorded in Book 1633, Page 56, in the Bureau of Conveyances at Honolulu, T. H.; and that the foregoing instrument was executed in the name and behalf of said Yotaro Fujino (also known as Yootaro Fujino) by said Tokuichi Esuda and Yasuo Tsutsumi as his attorneys-in-fact; and said Tokuichi Tsuda and Yasuo Tsutsumi acknowledged said instrument to be the free act and deed of said Yotaro Fujino (also known as Yootaro Fujino);

And on this 21st day of March, 1941, before me personally appear Tokuichi Tsuda and Yasuo Tsutsumi, to me personally known, who, being by me duly sworn, did say that they are the attorneys-in-fact of Chiyono Fujino duly appointed under Power of Attorney dated December 23, 1940, recorded in Book 1633, Page 49, in the Bureau of Conveyances at Honolulu, T. H.; and that the foregoing instrument was executed in the name and behalf of said Chiyono Fujino by said Tokuichi Tsuda and Yasuo Tsutsumi as her attorneys-in-fact; and said Tokuichi Tsuda and Yasuo Tsutsumi acknowledged said instrument to be the free act and deed of said Chiyono Fujino.

/s/ ERNEST N. MURAKAMI,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

[Endorsed]: Filed April 15, 1946. [36]

[Title of District Court and Cause.]

REPLY

To the Honorable Presiding Judge of the United States District Court for the Territory of Hawaii:

For his reply to Defendant's Answer heretofore filed herein, Plaintiff alleges and shows as follows:

I.

He admits the allegations contained in paragraph XXV of the Answer.

II.

He admits the allegations contained in paragraph XXVI of the Answer.

III.

He denies the allegations contained in paragraph XXVII of the Answer, except the portion thereof alleging that on March 21, 1941, Tokuichi Tsuda and Yasuo Tsutsumi, as attorneys-in-fact for Yotaro Fujino, purported to give, transfer and convey the said real property by a deed of warranty, a true and correct copy of which deed is attached as Exhibit "B" and made a part of this Answer, to Plaintiff. [38]

He denies the allegations contained in paragraph XXVII of the Answer to the effect that the deed executed on March 21, 1941, was executed "without other lawful authority," and that the deed was

executed by Tokuichi Tsuda and Yasuo Tsutsumi, as attorneys-in-fact for Yotaro Fujino, "contrary to their powers as set forth in" the Power of Attorney dated February 20, 1941 (Exhibit "D" attached to the Answer).

And in connection with the allegations contained in paragraph XXVII of the Answer, Plaintiff further alleges that Tokuichi Tsuda and Yasuo Tsutsumi, acting in good faith as attorneys-in-fact for Yotaro Fujino, in pursuance of the powers granted to them by virtue of the Power of Attorney dated February 20, 1941 (Exhibit "D" attached to the Answer), and pursuant to lawful and specific instructions given to them by the said Yotaro Fujino, executed the said deed on March 21, 1941 (Exhibit "B" attached to the Answer), and thereby gave, transferred and conveyed the real property described in said deed to the Plaintiff.

Further replying to the allegations contained in paragraph XXVII of the Answer, Plaintiff alleges that said deed dated March 21, 1941, was executed by said Tokuichi Tsuda and Yasuo Tsutsumi, as the attorneys-in-fact for said Yotaro Fujino, in good faith and pursuant to the lawful and specific instructions from the said Yotaro Fujino to execute and deliver said deed and to convey by way of gift said real property described in said deed to the said Plaintiff.

IV.

He denies the allegations contained in paragraph XXVIII of the Answer.

Further replying to the allegations contained in said paragraph XXVIII of the Answer, Plaintiff alleges that the [39] legal and equitable right, title and interest in and to the real property and the legal and equitable ownership of said real property became vested in the Plaintiff by virtue of said deed dated March 21, 1941, and that said Plaintiff has been and now is the real owner of said real property.

V.

He denies the allegations contained in paragraph XXIX of the Answer.

VI.

He denies the allegations contained in paragraph XXX of the Answer.

Further replying to the allegations contained in paragraph XXX of the Answer, Plaintiff alleges that the conveyance of said real property by virtue of said deed dated March 21, 1941, was intended as a bona fide gift inter vivos from said Yotaro Fujino to the Plaintiff; that said gift was completed and consummated without reservation of any kind, and that upon the execution and delivery of said deed said Plaintiff became the sole legal and equitable owner of said real property.

VII.

He denies the allegations contained in paragraph XXXI of the Answer.

Further replying to the allegations contained in paragraph XXXI of the Answer, Plaintiff alleges

that the conveyance of said real property by the said Yotaro Fujino, through his duly appointed attorneys-in-fact, was a bona fides transaction and that it constituted a bona fide gift of said real property from said Yotaro Fujino to the Plaintiff; and that said conveyance was not a sham, was not fictitious and was not intended to conceal or cloak any fact whatsoever; and that said conveyance [40] was not intended to conceal any beneficial ownership of said real property in Yotaro Fujino, or any other person.

VIII.

He denies the allegations contained in paragraph XXXII of the Answer and denies specifically that Plaintiff acted directly or indirectly for the benefit of, or on behalf of said Yotaro Fujino, at any time since March 21, 1941, with respect to said real property.

Further replying to the allegations contained in paragraph XXXII of the Answer, Plaintiff specifically denies that he is a national of a foreign country or a designated enemy country (Japan) within the purview of the Trading with the Enemy Act, as amended, and Executive Order No. 9095, as amended.

Further replying to the allegations contained in paragraph XXXII of the Answer, Plaintiff alleges that since March 21, 1941, Plaintiff has been and now is the only person entitled to said real property in law and in equity and that since March 21, 1941, said Yotaro Fujino has not had and does not now have any interest whatsoever in said real property.

Wherefore, Plaintiff prays that upon a full hearing hereof, Plaintiff be granted the relief prayed for in his Complaint or such other, further or different relief as to this Court may seem equitable, just or proper.

Dated: Honolulu, T. H., May 4th, 1946.

/s/ KANAME FUJINO,
Plaintiff.

SMITH, WILD, BEEBE &
CADES,

Attorneys for Plaintiff.

By /s/ E. H. BEEBE. [41]

Territory of Hawaii,
City and County of Honolulu—ss.

Kaname Fujino, being first duly sworn, on oath, deposes and says:

That he is the Plaintiff named in the above entitled Court and cause and is the person making the foregoing Reply; that he has read the same, knows the contents and that the same is true.

/s/ KANAME FUJINO.

Subscribed and sworn to before me this 4th day of May, 1946.

[Seal] /s/ FRANCES H. NAKAMURA,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

My commission expires October 1, 1948.

[Receipt of Reply acknowledged.]

[Endorsed]: Filed May 6, 1946.

In the United States District Court for the
District of Hawaii

April Term 1947

Civil No. 704

KANAME FUJINO,

Plaintiff,

vs.

TOM C. CLARK, Attorney General of the United
States as Successor to the Alien Property
Custodian,

Defendant.

DECISION

J. Frank McLaughlin, Judge

Attorneys for Plaintiff:

Smith, Wild, Beebe & Cades, Bishop Trust Building,
Honolulu, T. H.

Attorneys for Defendant:

John F. Sonnett, Assistant Attorney General;
Harry LeRoy Jones, Special Assistant to the Attorney General;
George B. Searls, Chief Trial Attorney;
William J. Conner, Attorney, Department of Justice,
Washington 25, D. C.; Ray J. O'Brien, United States Attorney for the District of Hawaii;
George W. Jansen, Chief Trial Attorney, Department of Justice, Washington, D. C.

This suit is founded upon Section 9 (a) of the Trading with the Enemy Act (50 U.E.C. App.

Section 9 (a)) and has been brought by the plaintiff to recover six parcels of real property vested under the Act and Executive Order No. 9095, as amended, by the Custodian on December 3, 1943 (Vesting Order No. 2724; Fed. Reg. 16937).

From the evidence the following data is derived and recorded as the Court's

FINDINGS OF FACT

1. This Court has jurisdiction of the parties and of the subject matter (50 U.S.C. App. Section 9 (a)).

2. Plaintiff is a citizen of the United States and a resident of Honolulu, Territory of Hawaii.

3. Defendant is the Attorney General of the United States and as such is successor to the Alien Property Custodian (11 Fed. Reg. 1198).

4. On December 3, 1943, the Custodian vested title to six parcels of land in Honolulu. [44]

5. Plaintiff was the record owner of the land the title to which the Custodian vested.

6. At all times herein involved, Yotaro Fujino and Chiyono Fujino, parents of plaintiff, were residents, nationals, and subjects of Japan. In Japan Yotaro Fujino disposed of the scrap iron shipped there by his Hawaiian business enterprise and arranged for the shipment of cement to his company in Hawaii.

7. Prior to March 21, 1941, Yotaro Fujino was the record owner, as well as the true and beneficial owner, of this land.

In 1940 Yotaro Fujino, age 55, discussed with his Hawaiian attorney who was visiting Japan his Hawaiian business affairs. The strained international situation was a factor in this discussion. At this conference Yotaro Fujino perfected his plan to give his Hawaiian land to his only son, and to incorporate his business located thereon and to give his family shares therein in such a way that he could retain control of them and of their shares. Based upon this plan, he issued appropriate instructions to his attorneys in fact in Hawaii through correspondence with his business advisor, Seitaro Yamamoto.

In discussing his plans with his son, Yotaro Fujino told his son when he directed him to execute a power of attorney to the same two men who held a like power from his father that some day he would give the whole business in Hawaii to him, but that in the meantime he should go to school and prove himself and show that he can run the business.

8. On February 20, 1941, Yotaro Fujino executed in Japan a general and new power of attorney to Tokuichi Tsuda [45] and Yasuo Tsutsumi of Honolulu, by the terms of which he authorized his attorneys in fact, amongst other things, "to buy, take or lease and otherwise acquire, and to hold, sell, mortgage, hypothecate, pledge, lease and otherwise dispose of, and in any and every way and manner deal with real property, leaseholds and other interests in real property" (Plaintiff's Ex-

hibit E). Tsuda and Tsutsumi have acted under this and a prior similar power since 1935, a year in which Yotaro Fujino went to Japan to reside permanently. This new, 1941 power of attorney was executed because of the confusion arising from two nearly identical powers executed by him in 1935 prior to leaving for Japan, in one of which his first name was spelled "Yootaro."

9. At all times here involved Tsuda and Tsutsumi were also attorneys in fact under general powers of attorney for plaintiff's mother and for the plaintiff. As of the date of trial Tsuda and Tsutsumi still held unrevoked powers of attorney from the plaintiff, his father, and his mother.

10. For years prior to November 27, 1940, plaintiff's father, Yotaro Fujino, was the sole owner of a business known as the Oahu Junk Company and Oahu Lumber and Hardware Company. On November 27, 1940, the Oahu Junk Company, Ltd., was incorporated, and upon December 2, 1940, all of the assets of Yotaro Fujino's business enterprise, except the real estate here involved, were transferred by Yotaro Fujino, acting through his attorneys in fact, to Oahu Junke Company, Ltd., "in consideration of the * * * issuance to him of 790 shares of capital stock" of the corporation (Defendant's Exhibit No. 4). This stock was issued of [46] record at Yotaro Fujino's direction as follows:

Yotaro Fujino.....	238 shares
(Father)	
Chiyono Fujino.....	118 shares
(Mother)	

Kaname Fujino.....	200 shares
(Only son, plaintiff)	
Katsue Fujieki	117 shares
(Daughter)	
Shizue Maneki.....	117 shares
(Daughter)	

At the same time the plaintiff, his mother, and each daughter executed promissory notes to Yotaro Fujino for the par value of the shares registered in their names. Yotaro Fujino required his wife, son, and daughters to execute these notes to him so that he could retain control over them and their stock in the corporation.

11. The real property here involved, except for a small parcel, was and is occupied by the business enterprise, whether as a sole proprietorship or as a corporation, as its principal place of business, and was and is necessary and indispensable to the conduct and operation of the business.

12. On March 13, 1941, Yotaro Fujino, while working out his plan to give his real estate to his son, through his attorneys in fact mortgaged to a local bank this real property for \$15,000, and the indebtedness has since been paid by the Oahu Junk Company, Ltd. (Plaintiff's Exhibit K.)

13. On March 21, 1941, the attorneys in fact of Yotaro Fujino purporting to act for him under the power of attorney dated February 20, 1941 (Plaintiff's Exhibit E) [47] executed a deed to the real estate here involved by which they purported to convey it to the plaintiff as a gift. The

deed was not delivered to the plaintiff until May, 1941, when he returned from Japan, and it was not recorded until May 19, 1941. Plaintiff endorsed for the bank his father's mortgage note at the time the deed was delivered to him.

14. Three months after the deed was delivered to plaintiff, at the suggestion of the attorneys in fact, rent was paid plaintiff by the corporation from the date of the deed. The rental figure of \$300 per month net was suggested by Tsuda and Tsutsumi and accepted without question by plaintiff. Plaintiff used the rental money to support himself, to help his sisters, and to care for his father's family obligations. In addition a tax liability of his father's—\$8,000—was paid by plaintiff through a transaction by which the corporation loaned plaintiff the money and credited the rent as it fell due against the loan; the \$8,000 was to be credited upon plaintiff's note to his father (Plaintiff's Exhibit P). Plaintiff knew nothing of the value of the land, nor the rental value thereof. He took no active part in the management of the corporation. The management of the business and the real estate was left entirely to the attorneys in fact, and plaintiff with regard to each did what he was advised to do by his father's attorneys in fact.

15. Although record title to the six parcels of land stood in plaintiff's name, he did not have or purport to exercise complete and absolute ownership of the property. Notwithstanding the deed, plaintiff's father, the grantor, has, through his

attorneys in fact and personally, [48] retained control and the beneficial ownership of the land. In holding the record title to the land, plaintiff has acted for and in behalf of his father and has been controlled by him.

Comment

This suit is in substance against the United States, and consequently the plaintiff must meet the terms and conditions under which the sovereign has consented to be sued. *Cummings vs. Deutsche Bank und Discontogesellschaft*, 300 U.S. 115; *Becker Steel Co. vs. Cummings*, 296 U.S. 74.

The plaintiff has failed to meet the burden of proving (1) that he has an "interest, right or title" to the real property (Section 9(a) of the Act) and that if he has, (2) he holds the same "for his own * * * and sole use and benefit." (Section 5(b) of the Act; Executive Orders No. 8389 and 9095, both as amended.) *Von Zedtwitz vs. Sutherland*, 26 F. (2d) 525; *Draeger Shipping Co., Inc., vs. Crowley*, 55 F. Supp. 906.

In the first place the plaintiff has no title to the real property. True his father, as part of his plan, admittedly intended to make a gift of it to him, but the means employed rendered the execution of his plan ineffective.

Under the laws of Hawaii (Rev. Laws 1945, Section 12757) powers of attorney for the transfer of real property must be recorded, otherwise the conveyance is not binding to the detriment of third

parties. Exhibit E was recorded, but it gave Yotaro Fujino's attorneys in fact no authority to give away any of his assets. The deed of March 21, 1941 (Exhibit H), is not binding upon the Custodian.

To authorize a gift of an asset by an agent, [49] the agent must have such a power expressly and clearly conferred. *Kaaukai vs. Anahu, et al.*, 30 Hawaii 226; *Brown vs. Laird*, 134 Or. 150, 291 Pac. 352, 73 A.L.R. 877, 884; *Bertelsen vs. Bertelsen*, 122 Pac. (2d) 130. See also 2 Am. Jr., "Agency," Sections 31, 145; 2 C.J.S. "Agency," Section 114, p. 1332; and *Mechem on Agency* (2d Ed.), Sections 783, 818.

Clearly "give, grant, bargain, sell, and convey" (Exhibit H) is not within the power "to hold, sell, mortgage, hypothecate, pledge, lease and otherwise dispose of" (Exhibit E). The argument that a gift is within the meaning of the phrase "and otherwise dispose of" for what is a gift but that which is not a sale or a mortgage, is not convincing. This catchall phrase adds nothing, for it refers to such undescribed methods of disposition as may have been omitted (but were not) and are in nature like those specifically enumerated. Exhibit E must be read as a whole, and thus read it is obviously a grant of—as it says—full and adequate power "to carry on and transact all my business in the Territory of Hawaii." A gift is not a business transaction.

So it is that that which grantor himself could have done, he did not give his agents the power to do, and as against the interests of a third party the grantor's unrecorded, relayed directions by letter and cable to his agents to do what they did do, were ineffective, and the deed conveyed no interest in or title in the land to the plaintiff.

But even assuming that the power of attorney be held to include the power to make a gift, plaintiff still is [50] not entitled to recover because of the provisions of Section 5(b) of the Act and Executive Orders issued thereunder, which he has been unable to surmount.

In keeping with the purposes of the Trading with the Enemy Act—to lessen the enemy's and increase our own ability to wage war successfully—*Josephburg vs. Markham*, 152 F. (2d) 644; *Silesian-American Corp. vs. Markham*, 156 F. (2) 793—it is permissible to look through and beyond the technicalities of the law of conveyancing to the realities. See *Helvering vs. Clifford*, 309 U.S. 331; *Losh vs. Commissioner*, 145 F. (2) 456; and *Commissioner vs. Buck*, 120 F. (2d) 775. Family arrangements are subject to close examination, and factual control is more significant than the niceties of legal title.

The evidence clearly discloses Yotaro Fujino's plan. He openly declared that he wanted to give members of his family shares in his business in such a way that he could still control it by controlling them. This he did most effectively by the stock transaction above described and found as

fact—fact incidentally as to which there is no dispute. The land upon which the business was operated was essential to the continued conduct of the business. By controlling the plaintiff as a son and an only son, and controlling him directly as to his use of his shares of stock, Yotaro Fujino indirectly but effectively silently controlled plaintiff's use and disposition of the land. Plaintiff dare not dispose of it or even set a rental figure himself lest he incur his father's displeasure and be read out of the family and out of the corporation. The evidence shows upon which side plaintiff's bread was buttered [51] and that he knew it, too. He would not dare move with respect to his title to the land contrary to his father's interest in the business, to which the land was most essential. Yotaro Fujino in point of fact controlled the plaintiff, thereby retaining the control, beneficial use, and enjoyment of the land in question.

In such a situation upon the date of vesting, the Custodian was justified in determining the plaintiff to be, despite his United States citizenship, one who in the national interest was to be treated as a national of a designated enemy country (Japan), and the property was validly vested under Sections 5(b) and 7(c) of the Act and Executive Orders issued thereunder.

Upon the facts found the following are the

Conclusions of Law

A. The Court has jurisdiction of the parties and of the subject matter. 50 U.S.C. App., Section 9—Trading with the Enemy Act.

B. Yotaro Fujino is an enemy alien and a national of a designated enemy country (Japan) within the meaning of Section 2 and 5(b) of the Trading with the Enemy Act, as amended, and Executive Orders Nos. 8389 and 9095, both as amended.

C. Plaintiff is a national of a foreign country within the meaning of Section 5(b) of the Act and Executive Orders Nos. 8389 and 9095, both as amended, in that he acted in behalf of or under the control of his father, Yotaro Fujino, a national of designated enemy country (Japan). [52]

D. Upon the date of vesting, the real property was:

1. Property "owing or belonging to or held for, by, on account of, or on behalf of or for the benefit of, an enemy" (Yotaro Fujino) not holding a license within the meaning of Section 7(c) of the Act, and

2. Property or an interest therein "owned or controlled by, payable or deliverable to, held on behalf of or on account of or owing to or which is evidence of ownership or control * * * by an enemy country or national thereof" (Yotaro Fujino—Japan) within the meaning of Section 5(b) of the Act and Executive Orders Nos. 8389 and 9095, as amended.

E. As against the United States or any third party, the March 21, 1941, deed of gift from Yotaro Fujino to the plaintiff is a nullity because the grantor's attorneys in fact had no power under

the February 20, 1941, power of attorney to give away an asset of the grantor's.

F. Plaintiff has no "interest, right or title" in the real property within the meaning of Section 9(a) of the Act, as amended.

G. The complaint should be and is hereby dismissed. An appropriate order approved as to form will be signed upon presentation.

Dated at Honolulu, Territory of Hawaii, April 22, 1947.

/s/ J. FRANK McLAUGHLIN,
Judge.

[Endorsed]: Filed April 22, 1947.

In the United States District Court for the
District of Hawaii

Civil No. 704

KANAME FUJINO,

Plaintiff,

against

TOM C. CLARK, Attorney General of the United
States as Successor to the Alien Property
Custodian,

Defendant.

JUDGMENT

This cause came on to be heard on the pleadings and proofs of the respective parties, whereupon, on consideration thereof, and the Court having filed

findings of fact and conclusions of law, it is now, on motion of Ray J. O'Brien, United States attorney for the District of Hawaii, one of the attorneys for the defendant:

Ordered, Adjudged, and Decreed, as follows:

1. Yotaro Fujino is an enemy alien and a national of a designated enemy country (Japan) within the meaning of Sections 2 and 5(b) of the Trading with the Enemy Act, as amended, and Executive Orders Nos. 8389 and 9095, both as amended.

2. Plaintiff is a national of a foreign country within the meaning of Section 5(b) of the Act and Executive Orders Nos. 8389 and 9095, both as amended, in that he acted in behalf of or under the control of his father, Yotaro Fujino, a national of a designated enemy country (Japan).

3. Upon the date of vesting, the real property involved in this action was: [54]

(a) Property "owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy" (Yotaro Fujino) not holding a license within the meaning of Section 7(c) of the Act, and

(b) Property or an interest therein "owned or controlled by, payable or deliverable to, held on behalf of or on account of or owing to or which is evidence of ownership or control * * * by an enemy country or national thereof" (Yotaro Fujino — Japan) within

the meaning of Section 5(b) of the Act and Executive Orders Nos. 8389 and 9095, as amended.

4. As against the United States or any third party, the March 21, 1941, deed of gift from Yotaro Fujino to the plaintiff is a nullity because the grantor's attorneys in fact had no power under the February 20, 1941, power of attorney to give away an asset of the grantor's.

5. Plaintiff has no "interest, right or title" in the real property within the meaning of Section 9(a) of the Act, as amended.

6. The complaint should be and is hereby dismissed, with costs to defendant.

Judgment approved, dated June 5, 1947.

/s/ J. FRANK McLAUGHLIN,
United States District Judge.

Judgment rendered, dated June 5, 1947.

/s/ WM. F. THOMPSON, JR.,
Clerk.

Entered June 5, 1947.

Approved as to form.

SMITH, WILD, BEEBE & CADES,
Attorneys for Plaintiff. EHB

[Endorsed]: Filed June 5, 1947.

In the United States District Court for the
Territory of Hawaii

Civil No. 704

KANAME FUJINO,

Plaintiff,

vs.

TOM C. CLARK, Attorney General of the United
States, as Successor to the Alien Property
Custodian,

Defendant.

TRANSCRIPT OF PROCEEDINGS

In the above-entitled matter, held in the United
States District Court, Honolulu, T. H., on October
31, 1946, at 9:00 o'clock a.m.,

Before: Hon. J. Frank McLaughlin, Judge.

Appearances:

Eugene H. Beebe, Esq., of the law firm of Smith,
Wild, Beebe & Cades, appearing for the Plaintiff;

Ray J. O'Brien, Esq., United States Attorney,
appearing for the Defendant;

George W. Jansen, Esq., Chief Trial Attorney,
Claims Division, Alien Property Section, Depart-
ment of Justice, appearing for the Defendant;

John F. Alexander, Esq., Examiner-Attorney,
Alien Property Section, Department of Justice, ap-
pearing for the Defendant.

The Clerk: Civil No. 704, Kaname Fujino,
Plaintiff, versus James E. Markham as Alien
Property Custodian, Defendant; case called for
hearing.

The Court: Are the parties ready?

Mr. Beebe: In one sense, yes, your Honor. Perhaps Mr. Jansen has explained to your Honor the circumstances surrounding this case. We have agreed to go ahead with what evidence we have, with the understanding that at a later date we will make the arrangement regarding the testimony of Yotaro Fujino, the father of the Plaintiff, who presently lives in Japan.

Mr. Jansen: I might say with regard to that, if it please the Court, that the Plaintiff has indicated that he is anxious to take the testimony of Yotaro Fujino in Japan, that an effort was made to get him here for the trial to take his testimony, without success. I am not sure that the testimony of Yotaro Fujino is relevant or material to the issues of this case, so more than a week ago I requested the Plaintiff to at least give me a statement of what they expected Yotaro Fujino would testify to. I can't say, in advance of receiving that statement, what I would do about it. But if I could see the statement or be advised of what they expect him to testify to, there is at least a possibility that we might be willing to admit that if Yotaro Fujino were called and sworn, that he [60] would testify as they say he would, subject, of course, to any objections as to relevancy, materiality, and any other objections that we would have if he were here present in person. I don't know whether you have made any effort to do that or not, have you, Mr. Beebe?

Mr. Beebe: Mr. Murakami was to give me the data with reference to what he understood Yotaro Fujino would testify to. I have not received that. As your Honor will recall, I didn't return here until the third of October. Mr. Murakami has been on Maui on several occasions. Since that time, frankly, I do not believe that he is prepared—the last time I talked to Mr. Jansen, I didn't understand that there was any pressing need for him to have that immediately. I don't think I am wrong in that statement.

Mr. Jansen: I suggested that we should have it before we finished our present work, because it might obviate the necessity of arranging for a deposition later.

The Court: The expectation is that this case may take at least two or three days, and it may be that during that time Mr. Murakami may advise you as to what such a statement would consist of?

Mr. Beebe: That's right.

The Court: And maybe we can make some headway. Otherwise, we can go ahead with the witnesses that you have available, and if need be under the rules, take this man's deposition in Japan. [61]

Mr. Jansen: I might say, if it please the Court, that I am not authorized to consent or to stipulate to take his deposition in Japan. I don't even know whether it is possible under the present circumstances to take the deposition, but if it is, I have no objection to taking it after this present hearing is closed, assuming that it can't be obviated through the suggestion that I made. But I don't want to

be bound to any agreement to take his testimony.

The Court: Well, that is not your phase of the case anyway.

Mr. Jansen: That's right.

The Court: It is Mr. Beebe's witness.

Mr. Beebe: I didn't understand that he was in any way bound by anything that has transpired before.

The Court: Well, we will have to make some arrangement because we can't keep this case open forever.

Mr. Beebe: There is no question about that. Of course, I thought there would be no difficulty about taking his testimony in Japan. I learned to the contrary at the time of our first conference with Mr. Jansen and Judge O'Brien. He said that while he was in Washington efforts were being made, as I recall, to take testimony in Germany, and he was advised that there were no counselor officers, etc., and that that deposition could not be taken in Germany. I had anticipated that we could get together and take his testimony.

The Court: What is the barrier to bringing the man here? [62] Wouldn't General MacArthur let him come?

Mr. Jansen: I don't know, if it please the Court.

The Court: The possibility has been exhausted?

Mr. Jansen: Yes, your Honor.

The Court: Well, I think we all understand that we are going to go as far as we can in the case at the present time, and we will leave this matter that we have been talking about open and

we will discuss it further at the conclusion of the testimony of the present witnesses. But with that matter in abeyance, are the parties ready to proceed?

Mr. Jansen: Yes, your Honor. At this time I would like to point out to your Honor that as of the 15th of October, 1946, all of the functions of the Office of the Alien Property Custodian were transferred to the Department of Justice, to the Attorney General.

The Court: By Executive Order.

Mr. Jansen: And therefore I move that Tom C. Clark, Attorney General, as successor to the Alien Property Custodian, be substituted as Defendant in this case.

The Court: Do you happen to have the number of this Executive Order?

Mr. Jansen: I'm sorry, I do not.

Mr. Beebe: You can supply it at a later date so far as I am concerned.

The Court: I gather from semi-official publication that [63] that has occurred, and I think you, too, Mr. Beebe, are in agreement that that has occurred within the last 30 or 60 days.

Mr. Beebe: I understand that that is the case, if your Honor please.

The Court: And subject to having the Executive Order reference, I will allow the substitution, so that henceforth this case will be against the Attorney General as successor to the Alien Property Custodian.

Mr. Jansen: Yes, your Honor.

The Court: We are right back in the same strategic or technical position we were after World War I.

Mr. Jansen: Yes, your Honor.

The Court: Very well. This proceeding, Mr. Beebe, is jurisdictionally based on Section 9 of the Trading with the Enemy Act, as amended?

Mr. Beebe: Yes, your Honor.

The Court: Very well. You may make an opening statement, if you so desire, or call your first witness.

Mr. Beebe: I question the necessity of making the opening statement, if your Honor please, other than say or reiterate what your Honor has said, that this action is an action in equity brought under Section 9 of the Trading with the Enemy Act, as amended, brought by Kiname Fujino, who is in court here in the Territory. And we have the property involved, conveyed to him by his father acting through attorneys in fact here in [64] the Territory, and it was the subject of the vesting order, the number of which is set forth in the pleadings, the vesting order number being 2724.

I think first, if your Honor please, I will call Mr. Murakami.

The Court: Mr. Murakami, will you come over here? Mr. Jansen, unless perhaps Mr. Beebe has informed you, Mr. Murakami is a member of the bar, if that makes any difference to you.

Mr. Jansen: Yes, your Honor.

The Court: I think you should know that.

ROBERT KIYOICHI MURAKAMI

a witness in behalf of the Plaintiff, being duly sworn, testified as follows:

The Court: Will you state your full name?

The Witness: Robert Kiyochi Murakami.

The Court: Age?

The Witness: Forty-six.

The Court: Residence?

The Witness: 927 Tenth Avenue, Honolulu.

The Court: Occupation?

The Witness: Attorney at Law.

The Court: Citizenship?

The Witness: United States.

The Court: Exclusively? [65]

The Witness: Exclusively.

The Court: You may take the witness.

Direct Examination

By Mr. Beebe:

Q. Mr. Murakami, are you a graduate of any law school?

A. University of Chicago Law School.

Q. And when did you graduate? A. 1925.

Q. With what, if any, degree?

A. Bachelor of Laws.

Q. And you were admitted to practice here in the Territory when? A. 1926.

Q. Do you remember when?

A. I think it's March.

Q. And since that date have you been engaged in the active practice of law? A. I have.

(Testimony of Robert Kiyochi Murakami.)

Q. In partnership with someone else or alone?

A. Now I'm in partnership with Masaji Marumoto; I have been since 1937.

Q. And prior to that time?

A. Prior to that time, from 1927, the middle I think it was, up until 1937, July 1st, I was in private practice alone.

Q. Prior to that time? [66]

A. Prior to that, since my graduation, I was associated with and I was working for the firm of Thompson, Cathcart and Beebe.

Q. You were with the firm of Thompson, Cathcart and Beebe for some time prior to the time that you were admitted? A. That's correct.

Q. And after?

A. That is correct; since I came back from the mainland I went into your office, Thompson, Cathcart and Beebe, Beebe's office.

Q. And do you speak Japanese?

A. Yes, I do.

Q. Read Japanese? A. Yes, I do.

Q. And have you made some study of the Japanese law? A. I have.

Q. Have you made any study of the Japanese law with particular reference to the descent of property? A. Somewhat, yes.

Q. Now, do you know a person by the name of Yotaro Fujino? A. Yes.

Q. When, would you say, that you first became acquainted with Yotaro Fujino?

A. I would say around 1927, 8, somewhere around there.

(Testimony of Robert Kiyoichi Murakami.)

Q. Did you know Yotaro's wife, Chiyono, as I recall her [67] name? A. Yes.

Q. That's spelled C-h-i-y-o-n-o?

A. That is correct.

Q. And when, do you recall, did you become acquainted with Chiyono?

A. A little later, somewhere, I should say, around 1930, '29-'30.

Q. I see. Now, what was the nature of your acquaintanceship with Yotaro Fujino, Mr. Murakami? A. I handled his legal business.

Q. From when to when, will you tell us?

A. I would say somewhere around 1928, '29, and well up to the time he left, and still continuing to some extent, I guess.

Q. Now, you mentioned the time he left. When, if you know, did Yotaro Fujino leave the Territory?

A. He left in 1935, I think it was.

Q. And at that time were you representing Yotaro Fujino? A. Yes, I was.

Q. And in what business was Yotaro Fujino engaged at that time?

A. In the business of junk dealer under the trade name of Oahu Junk Company, and also in the business of selling lumber and hardware under the trade name of Oahu Lumber and Hardware [68] Company.

Q. And did he have an established place of business at that time? A. Yes, he had.

(Testimony of Robert Kiyochi Murakami.)

Q. Where was that established place of business?

A. On North King Street. I think it was 1217 or so. I'm not sure about the number now—the same place where the Oahu Junk Company, Limited, now has the office.

Q. And are you acquainted with the descriptions of the property set forth in the petition in this case?

A. Yes, I am.

Q. Was that place of business about which you have just testified on the property or on the portion of the property that is the subject matter of this complaint?

A. The place of business is on portions of the property described in the vesting order of the petition.

The Court: Just for my practical orientation, is that property the property opposite that cemetery beyond Alakea Street on North King Street.

The Witness: No—on North King. That's the Honolulu Junk Company. The other one is on North King Street, on the makai side of the road just about opposite from the Union Supply Company, if you happen to know—it's past the canal after you pass the Palama Fire Station and past the canal and a little [69] further. It's on the lower side of King Street.

The Court: Thank you.

Q. (By Mr. Beebe): Now, at the time that Yotaro Fujino left for Japan, did he consult with you? A. Yes, he did.

(Testimony of Robert Kiyoichi Murakami.)

Q. At the time he left, did he have what I recall we termed a "return permit"?

A. He did not have a return permit.

The Court: Immigration?

The Witness: Immigration re-entry permit.

Q. Re-entry permit. And he left when, did you say, in 1935?

A. I think it was February or thereabouts, early part of 1935.

Q. Do you know whether or not there was a reason that he didn't have a re-entry permit?

A. Yes, I discovered that when he disclosed to me about the fact that he did not come in as a legal—by legal means, an illegal entrant.

Q. By that you mean that he slipped off the ship some time early in the nineteen hundreds?

A. That's the admission that he made to me.

Q. I see. Now, after his return to Japan in 1935, did he ever return to the Territory of Hawaii?

A. He did. He came here the same year, I think, about six or seven months later.

Q. As a treaty—

A. Yes, as a treaty merchant.

Q. And remained here how long at that time?

A. About a month or so. I'm not so sure. But he didn't stay very long.

Q. Now, during the time prior to Mr. Fujino's return to Japan and during his short visit as a treaty merchant, did you talk over with him the business, and so forth and so on?

A. Yes, I did.

(Testimony of Robert Kiyochi Murakami.)

Q. Now, did you know a gentleman by the name of Seitaro Yamamoto? A. Yes.

Q. How do you spell Seitaro?

A. S-e-i-t-a-r-o; Yamamoto, Y-a-m-a-m-o-t-o.

Q. And who was Seitaro Yamamoto?

A. An employee of Mr. Fujino doing business in the Oahu Junk Company and advisor in that business.

Q. Do you know how long Seitaro Yamamoto was employed in the Oahu Junk Company?

A. All the time I knew Mr. Fujino he was an employee.

Q. And did I understand you to say that he was an advisor?

A. Yes, he was an advisor of Mr. Fujino in his business.

Q. Do you know whether Seitaro Yamamoto is living or dead? [71]

A. The information is that he is dead.

Q. Do you know approximately when he died and if you can tell us where?

A. Nineteen forty-one when he was away on a trip, away from Hawaii. I think somewhere in the Philippines or Hongkong.

Q. Do you know Tokuichi Tsuda?

A. Yes, I do.

Q. And do you know Yasuo Tsutsumi?

A. Yes, I do.

The Court: What was the first name of that last one?

The Witness: Y-a-s-u-o, T-s-u-t-s-u-m-i.

(Testimony of Robert Kiyoichi Murakami.)

Q. How long have you known Mr. Tsuda and Mr. Tsutsumi?

A. About the same length of time that I had known Mr. Fujino, because they were employees there and later became attorneys-in-fact and manager and assistant manager of the business enterprise.

Q. Do you know whether they are Hawaiian-born?

A. They are American citizens, born here.

Q. And what about Yamamoto?

A. Yamamoto is a subject of Japan, was a subject of Japan.

Q. Now, with reference to the reading and writing of Japanese, will you explain to the Court the relationship, if any, that there was between Tsuda, Tsutsumi and Yamamoto and the old gentleman, Fujino?

A. Writings that came in Japanese from Yotaro Fujino [72] to the Oahu Junk Company always, most always, were brought to me by Mr. Yotaro—rather Seitaro Yamamoto. And replies, as far as I know, were made from here, Oahu Junk Company, to Yotaro Fujino in Japan, were in Japanese and were written by Mr. Seitaro Yamamoto. Whatever was done in English here in the Territory in communications and other matters, Mr. Tsuda and Mr. Tsutsumi, both of them would act as attorneys-in-fact, and sometimes in business matters one or the other would sign and send letters out and attend to them as correspondence, documents.

(Testimony of Robert Kiyoichi Murakami.)

Q. Now, what was the reason, if you know, for that division?

A. Well, one thing is that Mr. Yamamoto knew more about Japanese and could write. My information and my knowledge is that Mr. Tsuda and Mr. Tsutsumi can write some but not sufficiently to write the letter form of the Japanese language to convey their ideas to Mr. Fujino in Japan. They would be able to understand somewhat the reading part of the Japanese language but not to the extent of writing a letter in the conventional letter-writing form of Japanese. That's why Mr. Yamamoto was doing that end of the business of correspondence.

Q. I see. Then do I understand that after Mr. Fujino, Yotaro Fujino, went to Japan he corresponded with the Oahu Junk Company in Japanese?

A. That is true.

Q. And then, if you were consulted, you were consulted [83] by Yamamoto, who would bring the letter up to you, is that correct?

A. That's in most cases. Once in a while Mr. Yamamoto will come with Mr. Tsuda with the letter and consult me, but in most cases Mr. Yamamoto came by himself with the Japanese letter if he had something to do with the business or other matter with Mr. Fujino in Japan. And if a letter came in Japanese, he brought that letter and consulted me.

Q. Now, did Yamamoto, Tsuda and Tsutsumi remain in the employ of the Oahu Junk Company after 1935?

(Testimony of Robert Kiyoichi Murakami.)

A. Yes, they were in the employ of the company.

Q. And did they stay about the place of business and run the business?

A. Yes, Mr. Tsuda and Mr. Tsutsumi were appointed attorneys-in-fact. I think it was on the day that Mr. Yotaro Fujino left for Japan.

Q. That was in the year 1935?

A. Nineteen thirty-five.

Mr. Beebe: I think right here, if your Honor please, I will introduce those original powers of attorney. (Showing some documents to Mr. Jansen.)

Q. Mr. Murakami, do you know whether Chiyono Fujino left at the same time with her husband in 1935?

A. I believe she left on the same boat.

Q. Now, you mentioned powers of attorney executed by Yotaro Fujino in 1935. Did you have anything to do, as you [74] recall, with the drafting of that power of attorney?

A. I think I drafted one with that name, Yotaro Fujino.

Q. Did you have anything to do with the drafting of one for Chiyono Fujino, if you recall?

A. My recollection is not clear on that but I think it was drafted somewhere else.

Q. Did you have anything to do with the drafting of a power of attorney for Yootaro, Y-o-o-t-a-r-o Fujino?

A. I think that it was drafted somewhere else.

Q. I see.

(Testimony of Robert Kiyoichi Murakami.)

Mr. Beebe: If your Honor please, at this time I'd like to introduce in evidence three powers of attorney; the first, dated February 12, 1935, signed by Yotaro, Y-o-t-a-r-o, Fujino, acknowledged before R. K. Murakami, and recorded in the registry of conveyances, liber 1357, at page 73, apparently on the 5th day of October, 1936.

The Court: Excuse me. That's Yotaro Fujino's power of attorney to whom?

Mr. Beebe: To Tokuichi Tsuda and Yasuo Tsutsumi. A second one, from Yootaro Fujino, Y-o-o-t-a-r-o, Fujino, to Tokuichi Tsuda and Yasuo Tsutsumi, dated the 12th day of February, 1935, signed by Yootaro Fujino; acknowledgement taken before Maltbie Holt, recorded in the registry of conveyances in the Bureau of Conveyances on the 1st of March, 1935, in liber 1270, on pages [75] 42-43. And one from Chiyono Fujino to Tokuichi Tsuda and Yasuo Tsutsumi, dated the 12th of February, 1935, signed in Japanese characters, Chiyono Fujino, before Maltbie Holt, recorded in the Bureau of Conveyances on the 1st of March, 1935, in liber 1270 on pages 44 and 45.

The Court: And the other was to the same two people?

Mr. Beebe: Or, yes, your Honor.

The Court: That second one by Yootaro Fujino, that was recorded, too?

Mr. Beebe: Yes, your Honor, it was recorded.

The Court: I think you may have mentioned it but I didn't catch it.

(Testimony of Robert Kiyochi Murakami.)

Mr. Beebe: Yes, the 1st of March, 1935, in liber 1270, pages 43-43. I'm sorry to say that we haven't photostatic copies. I have just talked to Mr. Jansen, and with the Court's approval we might at a later date withdraw these originals and have photostatic copies made and substitute the photostatic copies in the record and furnish Mr. Jansen with a copy.

Mr. Jansen: That is agreeable.

The Court: Very well. And you are offering these in evidence and there is no objection?

Mr. Jansen: No objection.

The Court: Very well, Mr. Clerk, they become—

The Clerk: "A," "B" and "C" in the order offered.

The Court: "A," "B" and "C" in the order offered. [76]

(Plaintiffs Exhibits "A," "B" and "C" were received in evidence.)

[Plaintiff's Exhibits A, B and C set out on pages 459 to 467.]

Q. (By Mr. Beebe): Now, Mr. Murakami, subsequent to the giving of these powers of attorney, known as "A," "B" and "C" in the record, do I understand that Tsutsumi and Tsuda and Yamamoto would come into the office when various letters were received? A. That is true.

Q. And were also exhibited to you by either Yamamoto or Tsuda or Tsutsumi during the period of time from 1935, we will say, on down to 1940?

A. Yes.

(Testimony of Robert Kiyoichi Murakami.)

Q. Did you, prior to 1935, see Yotaro Fujino write?

A. I wouldn't say that—before that, not very often, when he was here he may have written something in my office or signed something, but before 1935 not very often anyway.

Q. Well, when letters were brought in to you, did you know enough about Yotaro Fujino's handwriting to recognize whether or not those letters were in his handwriting in Japanese?

A. Yes, I could recognize that.

Q. Now, prior to the time Yotaro Fujino left for the first time, during the time he was here in 1935 as a treaty merchant and thereafter, did you have any conversations or see any letters written by Yotaro Fujino regarding the incorporation of his business, known as Oahu Junk Company and the [77] other name that you have given us?

A. Yes.

Q. Perhaps that question was a little bit premature. Prior to 1945, how was the Oahu Junk Company operated; that is, as an individual, as a corporation, or as a co-partnership?

A. In 1945?

Q. 1935 to 1940.

A. In 1940? It was in individual proprietorship prior to November 27, 1940.

Q. And by that you mean what?

A. Mr. Fujino operated individually.

Q. As Aahu Junk Company?

A. Yes, under the trade name of the Oahu Junk

(Testimony of Robert Kiyochi Murakami.)

Company, and also as I said, under another trade name insofar as his lumber and hardware business was concerned, under the trade name of the Oahu Lumber and Hardware Company.

Q. And what took place in November of 1940?

A. The business of Yotaro Fujino was incorporated and the sole proprietorship ceased and a corporation was organized.

Q. Did you have anything to do with the incorporation?

A. Yes, I was the one who fixed up all the papers and I had the papers drawn and filed with the Treasurer's Office and consulted them and they consulted me in meetings and all transactions in connection with the corporation.

Q. When, if you recall, was the question of the corporation [78] first brought up and by whom?

A. Originally I think in some very casual way, not too seriously, but before Mr. Fujino left in 1935, he mentioned about it. We talked about the property and necessity of incorporating.

Q. When was it next brought up?

A. When he came back here.

Q. That was——

A. In the same year, for a short time.

Q. And next when was it brought up?

A. Either 1938 or '39. Anyway, seriously in 1939, the latter part.

Q. Nothing, however, was done in 1939 about the physical act of incorporating? A. No.

(Testimony of Robert Kiyochi Murakami.)

Q. When was it next brought up, if there was a next time?

A. In Japan when I was there on a vacation trip in 1940.

Q. When did you go to Japan in 1940, Mr. Murakami?

A. In the latter part of March of 1940. I left here with my family and I think I reached there about the first of April, 1940.

Q. And remained in Japan for how long?

A. Until the latter part of July when I came back here.

Q. Now, while you were in Japan, did you see Yotaro Fujino? [79]

A. Yes, I did.

Q. For how long a period of time, would you say, all told?

A. All told I would say at least four, five days in a stretch in April, and then a couple of times again later on before, just before I left Japan in July.

Q. Now, was the matter of incorporation of Oahu Junk Company, the matter of the real property owned by Yotaro Fujino and other matters, taken up with Fujino at that time? A. Yes.

Q. Will you tell the Court exactly the matters that were taken up with Yotaro Fujino during the time of your visiting Japan?

A. The matters taken up were, first, the matter of incorporating the business of Mr. Fujino here in the Territory, and the dealing of the disposition

(Testimony of Robert Kiyoichi Murakami.)
of the property here in the Territory belonging to Mr. Fujino.

Q. By that, what do you mean?

A. As to what he wanted to do, what he wished to do and hoped to do about his property, his business, real property and all other property which he had in the Territory.

Q. Was the matter of taxes taken up with him and explained to him, etc.?

A. That is correct.

Q. Will you tell the Court at least—well, about that?

A. Discussed with him the matter of gift tax and the [80] inheritance tax, if he should die all of a sudden without any provision made, and as to the gift tax exemptions that might be taken advantage of from year to year if gifts were made to his children from time to time.

Q. If gifts were made to his children, is that your language? A. Yes.

Q. Go ahead. I'm sorry.

A. And the amount of the inheritance tax that probably the estate would have to pay if he just died without making provision during his lifetime. And the advantage of the incorporated form of business enterprise as compared to proprietorship, especially in the matter of making transfers. And how easy it would be when one dies—I explained the advantages of a corporate set-up as against the individual set-up. And the matter of, in his case, the matter of inheritance and where the property

(Testimony of Robert Kiyochi Murakami.)
would go; and under the Japanese law, as I understood it, and under our laws in the Territory. And told him about the fact that as far as real property was concerned, probably it will go under our laws to his children, but as far as the personal property was concerned I was of the opinion that it probably would go according to the law of the domicile, and Mr. Fujino himself had not been, anyway at that time, already a domicile of Hawaii. He had already left for Japan. So [81] everything would go according to the law of Japan, and that knowing that he had two—let's see—two girls here, one of them already married, the other one contemplating marriage; and knowing also that the son, the only son, was not a Japanese national, that therefore he would not inherit according to the laws of Japan, that the property here, that is, all the property here he had, the big business he had in Hawaii would probably—even that personal property—would go to someone in Japan that has no direct relation with him, that is not his children but some other collateral heirs. And explained to him that under all those circumstances that some method of disposition should be devised by him while he was hale and healthy.

Q. Now let's right here clear up the family situation. There were how many children in the family?

A. Three children, two girls and one boy, Kaname.

(Testimony of Robert Kiyoichi Murakami.)

Q. And do you know where those children were born? A. All born in the Territory.

Q. And, as I recall, you said one of the girls had already married? A. Yes.

Q. And was she residing here in the Territory in 1940? A. That's true.

Q. The other girl, where was she residing?

A. In the Territory.

Q. And where was Kaname at that time? [82]

A. Kaname was then in Japan.

Q. I see. Then under the laws of Japan who inherited upon the death of a father with reference to girls and boys?

A. Normally the eldest child will get most of it, practically all of it under the law of Primogeniture.

Q. The eldest child? A. Eldest boy.

Q. The eldest boy? In this case, if there is only one boy, what would happen?

A. One boy, well, he'd get all.

Q. I see. Sorry to have interrupted you, but will you go ahead now with your end of the discussion or your end of the explaining so far as Yotaro Fujino is concerned.

A. Well, as I was trying to tell you, as stated just now, under normal circumstances the boy will get it, Kaname will get it all. But under the circumstances that Mr. Fujino and his son—Kaname being expatriated, having been expatriated, was not on the family record and was no longer a son of of the Fujino family, in other words, he was entirely foreign, and therefore my way of interpret-

(Testimony of Robert Kiyoichi Murakami.)

ing the Japanese law was that Kaname would get nothing. And the girls, as they marry out, then they no longer would be heirs or they wouldn't inherit Mr. Fujino's property but some collateral heir, probably a nephew or somebody else would inherit his property.

Q. Now, you have mentioned the family record. I wish [83] you'd explain what you mean in connection with your mentioning the family record there, Mr. Murakami.

A. Well, the Japanese system is, the family is the unit, and in Mr. Fujino's case, family's case, he was the head of the family.

Q. Now, what do you mean by that?

A. Well, he was, well, the head of the family.

Q. Well, you said in Mr. Fujino's case. Now we are dealing with two.

A. Well, Mr. Fujino's family in this case.

The Court: The father's case?

The Witness: The father's case.

Q. The father was the head of the family and he was——

A. Yes. And Kaname and the two girls were originally in the family record as being the children of the head of the family. And normally if nothing had been done, if nothing had been done, Kaname Fujino upon Yotaro Fujino's death would inherit most, if not all, of the property belonging to Yotaro Fujino, as to one who would succeed and become the next head of the family. But Kaname, having expatriated and having left the family by

(Testimony of Robert Kiyochi Murakami.)

process of law, he was no longer in the Yotaro Fujino family, and therefore would not inherit, would get nothing. The same with the daughter who had already married and had married into some other family. And the next daughter, the only other child remaining, was the younger daughter, of course [84] was older than Kaname, who was about to get married here in Honolulu. So we discussed, Mr. Yotaro Fujino and I discussed the eventuality of his dying and what would happen to his property. I was not concerned too much about what he had in Japan but with what he had here in the Territory. And we discussed about the disposition of that and the incorporation of the business here in the Territory.

Q. Now, was it agreed at that time that the business should be incorporation?

A. Yes, it was, that is, after discussion, long, lengthy, pro and con and all that; he said, I think that's the best way, we'll have the business incorporated.

Q. Then was the question of how the shares should be issued talked over with him, and was it agreed as to how the shares of the corporation should be issued after incorporation?

A. Not the exact proportion; only what was discussed with me was along this line. He indicated a desire to have the business incorporated and to have, to give to his children a substantial holding, and inquired of me how he could more or less keep tab or keep some sort of some measure of control

(Testimony of Robert Kiyoichi Murakami.)

over those shares that he is going to give to his kids, to his children. I told him that, well, the only way is that if you give you can let them pay for it, take a note back. And, as I explained before, if you want to you can give them four thousand dollars a year, or so forth, so that you had, they'd have the [85] exemptions under the gift tax law, and you can do that; or you can hold it and cancel their note whenever you felt like it. That's one way of keeping some measure of control.

Q. Now, was there any agreement at that time as to how this would be done, that is, did he say we'll do it this way, or was that just left tentative and you explained the various things to him?

A. That was tentative.

Q. I see. And at any time was there agreement between you and Yotaro while you were in Japan, or did that come along later?

A. That was not a definite instruction to me to make so many shares to somebody. There was no such definite instruction.

Q. At that time?

A. Not at that time.

Q. I see. Now, was the question discussed as to whether or not the real estate that he owned should be included in the corporate set-up, or how was the real estate to be handled, or how was it discussed?

A. His idea was that he didn't want to have the real property in the corporation, that he wanted—he said—the way he put it was that that is for Kaname Fujino, not to put that in the corporation;

(Testimony of Robert Kiyoichi Murakami.)

in other words, not to incorporate the real property, or rather to put his part of the assets of [86] the corporation.

Q. Now, you returned to the Territory when?

A. In July 23rd, I believe it was, 1940.

Q. Might I ask one question before we proceed? Have you explained or told us everything that took place between you and Yotaro Fujino in Japan with reference to the property and incorporation, as to taxes, gift taxes, etc.? I may have interrupted your train of thought.

A. Well, I don't know whether I told you everything, but I know we discussed almost everything from inheritance tax, loan and gift tax, and specific exemption and annual exemption of the donees, and the fact that probably he will have to pay even a federal and state tax, and with the amount of property that he had, and the Territorial inheritance tax, and went into his business and the disposition of his property upon his death, and other things pretty thoroughly. I may have forgotten something. I don't know.

The Court: I'm just wondering how old the father was about this time.

The Witness: Not too old. He is possibly now over sixty anyway. At that time he was in the middle fifties, I should say; a small man and looks rather young. He doesn't look too old but I will say around the middle fifties at that time.

Q. Now, you returned to the Territory, as I recall it, in July of 1940? [87]

A. That's true.

(Testimony of Robert Kiyochi Murakami.)

Q. After that time did you deal with either Tsutsumi, Tsuda or Yamamoto with reference to incorporation, or did you just go ahead and start drafting papers?

A. No, we had discussions and conferences with Tsutsumi. Tsuda and Yamamoto, myself, all had several conferences, I'm sure.

Q. And did you finally——

A. Beg pardon?

Q. Did you finally draw up articles of incorporation, etc.? A. Yes.

Q. Do you happen to have in your files the articles of incorporation?

A. I have just ordinary copies, not certified copies, I think in my file.

Mr. Beebe: May we take a brief recess?

The Court: We will take a brief recess at this time.

(A short recess was taken at 10:00 a.m.)

After Recess

The Court: You may proceed.

Q. (By Mr. Beebe): Mr. Murakami, directing your attention to document consisting of one, two, three, four, five, six, seven pages labeled or having on the face thereof, "In the Office of the [88] Treasurer of the Territory of Hawaii, in the Matter of the Incorporation of Oahu Junk Company, Ltd., Articles of Association," and another document attached thereto having on its face "In the Office of the Treasurer of the Territory of Hawaii, in the Matter of the Incorporation of Oahu Junk Com-

(Testimony of Robert Kiyoichi Murakami.)

pany, Ltd., Affidavit of Incorporation," I will ask you if these are the articles of association of the corporation Oahu Junk Company, Ltd., that you have just been testifying about? (Handing a document to the witness.)

A. This is the office copy of the original, original documents which were filed in the Territorial Treasurer's Office.

Mr. Beebe: I'd like to offer these articles in evidence, if your Honor please, with the understanding with Mr. Jansen that they will be compared or verified.

Mr. Jansen: We have no objection to the use of a copy, and we'd like the opportunity to verify it before it is filed.

The Court: Very well, subject to that understanding the document may become the Plaintiff's exhibit.

The Clerk: "D."

(Plaintiff's Exhibit "D" was received in evidence.)

[Plaintiff's Exhibit "D" set out on pages 468 to 478.]

Mr. Beebe: I don't see any necessity of encumbering the record with the by-laws. There doesn't seem to be anything in the by-laws that touches one way or another on this. [89]

Q. (By Mr. Beebe): Now, when, do you recall, were those articles filed under our law; when did the corporation become existent?

(Testimony of Robert Kiyoichi Murakami.)

A. If I am not mistaken, on the same day, November 27, 1940.

Q. I see.

A. That was the day it was executed; I believe it was filed the same day and maybe the next day, I'm not sure.

Q. Now, pursuant to those articles of incorporation, was stock issued? A. That is true.

Q. Was stock issued to Kaname?

A. I'm not sure about that now because the way I worked this particular corporation up, we had organized a thousand dollar corporation, to set the corporate set-up first, and then to transfer out; the assets came in immediately after the incorporation. And I'm not sure whether or not Mr. Kaname Fujino was one of the incorporators. He may have been, now. I'll have to refresh my memory.

Q. Was the capital increased later?

A. Yes, soon thereafter, a few days, a few days thereafter.

Q. And did Kaname later then become a shareholder or stockholder in the corporation of the Oahu Junk Company, Ltd.? A. Yes.

Q. Did the two daughters also become stockholders in the [90] corporation at a later date?

A. I believe the two daughters were original, were in the original list of the incorporators.

Q. Their names are what?

A. Beg pardon?

Q. The daughters' names?

A. Katsue Fujieki and Shizue Maneki.

(Testimony of Robert Kiyoichi Murakami.)

Q. Will you spell both of those names?

A. K-a-t-s-u-e F-u-j-i-e-k-i and S-h-i-z-u-e M-a-n-e-k-i.

Q. And you mentioned in your conversation with the old gentleman, Yotaro, in Japan the fact that the stock could be given outright or the stock could be given and a note taken back, etc. How was this matter handled at the time the stock was issued to the three children, that is, Kaname and the two girls?

A. When the stock was—the capital stock was increased for the expressed purpose of taking over the entire personal, that is, assets exclusive of real property, of Mr. Fujino's business, and I believe it was 790 shares of capital stock was the consideration for the transfer of the business assets of Mr. Yotaro Fujino to the corporation, that is, assets not including the real property. The shares were issued at the request of Mr. Yotaro Fujino through his attorneys-in-fact. I think it was 240 to Yotaro Fujino and 200 to Kaname Fujino, 117 apiece to Chiyono Fujino and Katsue Fujieki [91] and Shizue Maneki, making 790, if I am not mistake. That represented in the consideration for the transfer, as I said, of the assets of the business, assets of Yotaro Fujino doing business as the Oahu Junk Company and Oahu Hardware, Oahu Lumber and Hardware Company, to the corporation exclusive of the real property. Stocks were issued as per instructions to these, to the five members of the Fujino family. And as to the three children, that is,

(Testimony of Robert Kiyoichi Murakami.)

Kaname Fujino, Katsue Fujieki and Shizue Maneki, promissory notes were taken back by the old gentleman, Yotaro Fujino, \$20,000 for Kaname, \$11,700 each for the two daughters.

Q. Now, tell the Court why that was done?

A. That was as per—in according with the instructions with the Oahu Junk Company Mr. Yamamoto had and revealed to the meeting, to the conference, that the old gentleman wanted to have the notes from the children.

Q. I see.

A. And that was also passed at the directors' meeting, I believe, whereby the directors approved the pledging of the shares for the indebtedness from each of the children to Yotaro Fujino.

Q. Was the real property conveyed to the corporation or just the personal property formerly a part of Oahu Junk Company?

A. Just the personal property.

Q. I see. Now, at or about that time were new powers [92] of attorney obtained, if you know, from Chiyono and Yotaro Fujino?

A. Soon thereafter.

Q. Why, if you know, were new powers of attorney obtained when we have in the record as Exhibits "A," "B" and "C" powers of attorney issued by the father and mother of Kaname in 1935?

A. In order to consummate the rest of the transaction in connection with the corporation, and one of the remaining transactions was the matter of se-

(Testimony of Robert Kiyoichi Murakami.)

curing a portion or giving security for an existing debt which Mr. Yotaro Fujino had with the Bishop National Bank. To explain that further, the corporation in taking over the personal property and business of Yotaro Fujino assumed the liability set forth in the bill of sale. Among the liabilities were a few notes, I think one or two notes to the—unsecured notes to the Bank of Bishop, and I think there was a mortgage note for the balance of \$1,500, a total indebtedness to the bank being in round figures \$20,000. And with arrangements with the bank a mortgage was to be given on the real property of Yotaro Fujino in connection with the incorporation of the business, inasmuch as the real property was not turned over to the corporation. And also the power of attorney, new powers of attorney became necessary in connection with the giving of the mortgage because we discovered at about that time that Mr. Fujino had several pieces of property, real property, some of which were in his name of Yotaro, [93] Y-o-t-a-r-o, and some in his name as Y-o-o-t-a-r-o. And I believe one piece was a land court, was a land court title, which was in the name of Y-o-o-t-a-r-o. And we came across embarrassing situations where we had two powers of attorney, both dated the same day, and one was Y-o-o-t-a-r-o and the other one was Y-o-t-a-r-o. And in order to make the mortgage covering all the property to two different names, and also in connection with the transfer of the property to Kaname Fujino, subject to the mortgage, we had to get a

(Testimony of Robert Kiyochi Murakami.)
new power of attorney from Mr. Yotaro Fujino in Japan, and also from his wife Chiyono Fujino.

Q. Did you prepare those powers of attorney?

A. I believe the one signed by, sent to Yotaro Fujino in Japan, was prepared in your office by the bank.

Q. Do you know approximately the time that that was prepared?

A. About in December first, the middle part of December.

Q. What year?

A. 1940. And I think the other one to Chiyono was prepared in my office.

(Mr. Beebe shows two documents to Mr. Jansen.)

Mr. Beebe: At this time, if your Honor please, I'd like to offer in evidence the power of attorney from Yotaro, Y-o-t-a-r-o, Fujino, also known as Yootaro Fujino, to Tokuchi Tsuda and Yasuo Tsutsumi, the same being dated the 20th of February, [94] 1941, acknowledged before Charles H. Stephan, S-t-e-p-h-a-n, Vice Consul of the United States, Service No. 732. It is document No. 57281, Assistant Registrar of the Land Court, filed March 17, 1941, in the Land Court. And the second document, power of attorney from Chiyono Fujino, wife of Yotaro Fujino, alias Yootaro Fujino, to two named persons, Tokuchi Tsuda and Yasuo Tsutsumi, dated the 23rd of December, 1940, acknowledged before David Thomasson, T-h-o-m-a-s-s-o-n, Vice Consul of the United States, on the 23rd of December, 1940.

(Testimony of Robert Kiyochi Murakami.)

The Court: Any objection?

Mr. Jansen: No objection.

The Court: Very well, the documents may be received as Plaintiff's exhibits.

The Clerk: "E" and "F."

(Plaintiff's Exhibits "E" and "F" were received in evidence.)

[Plaintiff's Exhibits "E" and "F" are set out on pages 479 to 487.]

Mr. Beebe: Yotaro is "E," Mr. Thompson?

The Clerk: Yes, Mr. Beebe.

Q. (By Mr. Beebe): Now, you have mentioned, Mr. Murakami, an indebtedness of some \$20,000, as I recall, to the Bank of Bishop? A. Yes.

Q. Now, you mentioned also the fact that, as I recall, a mortgage in the amount of \$15,000 was given to the bank.

A. Well, that was to secure a portion of that pre-existing [95] indebtedness of Yotaro Fujino which went with the business and which was assumed by the newly organized corporation.

The Court: Let me get that clear. There was an existing mortgage which the corporation assumed for \$15,000?

The Witness: No.

The Court: Or was this mortgage——

The Witness (Interposing): I would say this—— at the time of the incorporation and the transfer of the business from the individual Fujino to Oahu Junk Company, Ltd., the indebtedness of Yotaro Fujino to the Bank of Bishop amounted to \$20,000, more or less. That indebtedness was assumed by

(Testimony of Robert Kiyoichi Murakami.)
the corporation as part of the whole transaction. Of that \$20,000, \$1,500 was secured debt to the Bank of Bishop, only \$1,500. And \$18,500 was not secured. And so the bank wanted some more. The effect was, after the conference—and the mortgage only covered one or two pieces of real property belonging to Yotaro Fujino—now, since the corporation was going to take over but didn't take over the land, the bank wanted to have its indebtedness secured to a bigger extent, and the final analysis was they wanted, they took \$15,000 covering all of the land that belonged to the old gentleman.

Mr. Beebe: I'd like at this time, if your Honor please, to offer in evidence a document purporting to be a mortgage made the 13th day of March, 1941. And I might say that the typewritten December, 1940, is stricken out. (Showing a document to the Court.) From Yotaro Fujino, also known as Yootaro [96] Fujino, whose wife's name is Chiyono Fujino, of Honolulu, and so forth, called a "Mortgagor," and Bishop National Bank of Hawaii at Honolulu, a national banking association, and so forth, "Mortgagee," mortgage purporting to be in consideration of \$15,000, the same being signed by Yotaro Fujino and Chiyono Fujino, by Tokuichi Tsuda and Yasuo Tsutsumi as attorneys-in-fact, being duplicate document number 57283 in the assistant registrar of the Land Court, and also bearing a stamp notation also recorded in the Bureau of Conveyances in Liber 1626, pages 166-172.

(Testimony of Robert Kiyochi Murakami.)

The Court: I take it there is no objection.

Mr. Jansen: No objection.

The Court: That therefore, becomes Plaintiff's exhibit——

The Clerk: "G."

(Plaintiff's Exhibit "G" was received in evidence.)

[Plaintiff's Exhibit "G" set out on pages 488 to 500.]

Q. (By Mr. Beebe): Do you know where that document was prepared, that exhibit "G" to which I have just referred? A. The mortgage?

Q. Yes.

A. That's the bank mortgage, and my knowledge is that it was prepared in your office.

Q. Now, subsequent to the time set forth in the two powers of attorney shown in the record as Exhibits "E" and "F," was the conveyance of the property described in Petitioner or [97] Plaintiff's Exhibit "G" made to Kaname Fujino, the Plaintiff in this case? A. Yes.

Q. And——

The Court (Interposing): Just a minute. I missed that. Prior to this mortgage, this land, or subsequent?

Mr. Beebe: I hope I didn't say prior.

Mr. Jansen: No, subsequent.

Q. (By Mr. Beebe): Who, do you know, prepared a deed, if such a deed was prepared?

A. Prepared in my office by myself.

(Testimony of Robert Kiyoichi Murakami.)

(Mr. Beebe shows a document to Mr. Jansen.)

Mr. Beebe: At this time, if your Honor please, I'd like to offer in evidence a deed from Yotaro Fujino, also known as Yootaro Fujino, whose wife's name is Chiyono Fujino. Grantor in consideration, purporting to be One Dollar; the conveyance being Kaname Fujino; the same being executed on the 21st day of March, 1941, by Yotaro Fujino, also known as Yootaro Fujino, by Tokuichi Tsuda and Yasuo Tsutsumi, his attorneys-in-fact, and Chiyono Fujino, by Tokuichi Tsuda and Yasuo Tsutsumi, her attorneys-in-fact; the acknowledgement being taken before Ernest N. Murakami; the same being a true copy of document number 58404, received in the registry of the Land Court on May 19, 1941, from which Certificate of Title No. 24074 has [98] been issued; the slip on the front thereof having a stamp notation, also recorded in the Bureau of Conveyances in Liber 1638, pages 423-427; signed by Oliver R. Aiu, A-i-u, assistant registrar of the Land Court.

Mr. Jansen: Now, with regard to this exhibit, if it please the Court, we do not deny that the attorneys-in-fact, Tsuda and Tsutsumi, actually executed this deed, that is, actually signed the deed, and that it was actually filed, and that this is the deed which was executed and signed and filed. But we do not want that admission to be construed as admitting that they had authority to do so. That we deny.

(Testimony of Robert Kiyochi Murakami.)

And if that is essential the admissibility of the document, we would object on that ground. As to it being the actual document signed and executed by the attorneys-in-fact and filed, we do not object on that ground. On the question of authority, we do not wish to be construed as conceding the authority of the attorneys-in-fact to execute the deed.

Mr. Beebe: I am perfectly willing that it be received with that understanding, that is, that it in no way bars them from that contention.

The Court: All right, that, therefore, becomes Plaintiff's Exhibit——

The Clerk: "H."

(Plaintiff's Exhibit "H" was received in evidence.)

[Plaintiff's Exhibit "H" set out on pages 501 to 509.]

Mr. Beebe: I think that is all, Mr. Jansen.

The Court: Very well, you may cross-examine.

Cross-Examination

By Mr. Jansen:

Q. Mr. Murakami, how long have you been practicing in Honolulu? A. Since 1926.

Q. You are engaged, I assume, and have been during all that time in the general practice of law?

A. That is true.

Q. Now, am I correct in assuming that you are authorized to testify regarding the confidential communications between you and your client, Yotaro Fujino?

(Testimony of Robert Kiyoichi Murakami.)

A. I have the authority of the attorneys-in-fact. I haven't been able to communicate with Mr. Fujino.

Q. You mean the only authority that you have to disclose what ordinarily would be privileged is authority that you have received from the attorneys-in-fact? A. That is true.

Q. You consider that sufficient?

A. Under the circumstances I have considered it that that is their desire to disclose what happened. I have considered it sufficient.

Q. Now, you had known Mr. Yotaro Fujino for how long?

A. I would say since about 1927, '28, around there.

Q. And do you know how long prior to that time he had lived and done business in Honolulu? [100]

A. Only from hearsay, but I knew that he had been in business for many, many years before that.

Q. Many years prior to 1927? A. Yes.

Q. Now, since 1927 did you handle all of his legal business for him?

A. Probably from 1927 to up about 1930 I may not have handled it all, just small bits of business probably. But from around 1930, I believe I have been doing all of his work.

Q. I assume that until he left Honolulu he consulted with you from time to time with regard to various problems of the business? A. Yes.

(Testimony of Robert Kiyoichi Murakami.)

Q. Would you say that you have considerable business as an attorney among the Japanese population of the Territory of Hawaii?

A. A fair amount.

Q. Would you say that your business in larger extent is representation of people of Japanese descent in the Territory of Hawaii?

A. That is true.

Q. They naturally gravitate towards a person of their own national descent, I assume?

A. I suppose it is easier to get in contact with their own kind. [101]

Q. And you speak Japanese? A. I do.

Q. And you read Japanese? A. I do.

Q. Were you educated entirely in the United States? A. Entirely.

Q. And where did you receive your education in the Japanese language?

A. Here in the Territory.

Q. Here in the Territory?

A. As well as some correspondence in extension courses from Japan.

Q. And, of course, in the customary use of it in day to day business I assume that you acquired a facility in that fashion, too?

A. Yes, that is quite a bit.

Q. Now, you say that Yotaro Fujino left the Territory of Hawaii in 1935?

A. Thirty-five, yes.

Q. And at that time you prepared a power of attorney for him to Tsuda and Tsutsumi?

(Testimony of Robert Kiyochi Murakami.)

A. Yes, my recollection is one—the one that is Yotaro Fujino, Y-o-o-t-a-r-o, doing business as Oahu Junk Company, to Tsutsumi and Tsuda, that one was prepared by me. As a matter of fact, I think I was a notary at the time and I took the [102] notary.

The Court: That would be Exhibit “A?”

Mr. Jansen: Yes, Exhibit “A.”

Q. (By Mr. Jansen): Exhibit “A” is the one that was prepared by you and in your office, and you took the acknowledgment, did you?

A. Yes, this is the one.

Q. Now, Exhibit “B” is another power executed by Yotaro but there the name is spelled Y-o-o-t-a-r-o, with two o’s in the first part of the name?

A. That’s right.

Q. Have you examined these powers of attorney before coming here to court?

A. Not particularly. I mean—you mean in detail?

Q. Yes.

A. No, I wouldn’t say that I made any particular study of it.

Q. I see.

A. I may have—I know that I checked them up many times in the past, though.

Q. You had occasion to check them in the past?

A. Yes.

Q. When did you first know that there were two powers?

A. Now, that’s hard to answer because—all the time I thought that my power of attorney was the

(Testimony of Robert Kiyochi Murakami.)

only one, for a long [103] time, although he did mention at the time he came to my office that he went to the bank to sign some document. I didn't know it was a power of attorney.

Q. Well, now, both of these powers are dated the same day, are they not? A. That's right.

Q. And they are both acknowledged the same day? A. That's right.

Q. Do you know who Maltbie Holt is?

A. Maltbie Holt used to work for the Bishop National Bank. I don't know whether he was an officer or not, but he was there. He was an official, city and county official, at one time, too.

Q. The powers, except for the spelling of the name, are practically identical, are they not?

A. Well, I suppose it is a general power; in that sense it is identical.

Q. A general power? A. Yes.

Q. But it was soon after, we will say within the space of at least six months, that you learned that there were two powers?

A. No, I wouldn't be able to say that. I don't think that I discovered that the existence of two different powers of attorney soon after. It must have been some time later, [104] quite a bit later that I learned about that. It may have been as late as the time we wanted to get the new power.

Q. Well, now, you said that Yotaro Fujino had illegally entered the Territory?

A. Yes, I made affidavit for him to that effect in my office before he left.

(Testimony of Robert Kiyoichi Murakami.)

Q. You made an affidavit to that effect?

A. I mean, he made a statement setting forth how he came in, and so forth, as I recall; for him, if I am not mistaken, I took the oath.

Q. Do you know how long he had lived in the Territory?

A. My recollection is, from his statement, since about 1906 or 8, somewhere around there.

Q. Since the early part of the twentieth century?

A. The early part, yes.

Q. And had he ever had any difficulty with his entry up to the time that he left for Japan?

A. By that you mean some immigration——

Q. With the immigration officials or anyone else?

A. Not that I know of except that he and I discussed and I informed him of the fact that being, having entered in that fashion, once he left the Territory that he probably would not be able to return here.

Q. Except as a treaty merchant?

A. Yes, except as a treaty merchant. And that was for [105] that purpose it was that we made the affidavit and about his property holdings and what not, so that he could get a proper visa from the American Consul should he want to return to the Territory to look after his business. And he did want to come back for that purpose.

Q. He did want to come back?

A. Just for that purpose.

Q. To attend to his business?

A. Yes.

(Testimony of Robert Kiyochi Murakami.)

Q. And he did secure an entry permit, a treaty merchant permit?

A. That's right. He got a Japanese passport and was visaed by the American Consul as a treaty merchant and came in.

Q. And treaty merchants—are you familiar at all with the way that is handled?

A. Well, in a general way.

Q. They ordinarily stay on indefinitely under those permits, do they not?

A. Yes, they could stay, I think, so long as they remain indefinitely if they maintain their status.

Q. Maintain their status as a treaty merchant?

A. As a treaty merchant.

Q. So what he did—he was always a national of Japan? A. Yes.

Q. Even though he may have illegally entered the Territory, [106] he was a national of Japan?

A. He was a national of Japan in the sense that is his citizenship that you are referring to, of course.

Q. Yes. So that what he did accomplish in his trip to Japan and the trip back here was to obtain a legal entry into the Territory as a treaty merchant under which he could probably stay here indefinitely?

A. Yes, I would answer that yes, but he wanted to come back and establish that so-called treaty merchant status so that if and when he had to come back for some purpose he could come back. And I

(Testimony of Robert Kiyochi Murakami.)

don't think he had any purpose in coming back right about six months after except to establish that.

Q. And did he establish that?

A. He did establish it. It wasn't his intention to remain long.

Q. And under that status he could have stayed here indefinitely? A. Yes, he could have.

Q. Now, I assume that you and he had discussed the advisability of establishing a legal entry to the United States or the Territory of Hawaii specifically? A. Specifically.

Q. And that was one of the reasons why he did what he did?

A. Well, as a matter of fact, I wasn't so sure myself [107] that he would be able to establish that. I knew that he had the qualifications, outside of the fact that he had come in illegally in the first place, and I thought that might be a black mark. So I told him, I don't think I can tell you for sure that you would be able to get the visa from the American Consul, and once you leave here it may be the last and you may never see the Islands again. But he wanted to go anyway. He was going to leave the business to his boys over here and retire from active participation in the management of the business. So he took that chance.

Q. You mean in 1935? A. Thirty-five.

Q. In 1935 he was talking about leaving the business to his boy?

(Testimony of Robert Kiyochi Murakami.)

A. No, I mean the management to these fellows over here, Mr. Tsuda and Mr. Tsutsumi and with Mr. Yamamoto, the three of them.

Q. Do you know whether Fujino had any other business interests besides the interests here in Honolulu?

A. I only know from newspaper articles and other hearsay, and he never told me very much about his interests in Japan. I—he probably had something.

Q. Well, in 1940 he was about fifty-five years old?

A. I should say around that, fifty-five, fifty-six, somewhere around there. [108]

Q. And in 1905, when he came to the Territory, he was then——

A. A youngster.

Q. What?

A. Very young, I guess.

Q. Quite young?

A. Yes.

Q. And all of his business life and business have been here in the Territory of Hawaii, have they not?

A. As far as I know.

Q. And whatever business he built up, he built up here in the Territory of Hawaii?

A. Originally, I think, he made his money here.

Q. Yes?

A. But as far as what other investments he had down there, I didn't know.

Q. So as far as you know, the major part of his holdings were here in the Territory of Hawaii and had been built up by him since he came to the Territory?

A. That is true.

(Testimony of Robert Kiyoichi Murakami.)

Q. Now, how long had you known Yamamoto?

A. About the same length of time, I guess; that is, since about 1927, '28.

Q. And Yamamoto was also a national of Japan?

A. Yes. [109]

Q. But you say that he was an employee of the Oahu Junk Company, of Yotaro Fujino?

A. Yes, he was.

Q. And that much of the correspondence was between Yotaro Fujino and Yamamoto?

A. Yes, only in this sense, now: As I recall, he had correspondence to him, addressed to him, too, but most of the correspondence came to Oahu Junk Company.

Q. Oh, I see.

A. In then ame of the Oahu Junk Company. But what I meant was that he was the one that took care of that, answering that type of correspondence in Japanese.

Q. Oh, I see. I guess I misunderstood you. The correspondence actually was between Oahu Junk Company here in Hawaii?

A. That's right.

Q. And Yotaro Fujino in Japan?

A. Yes.

Q. And was addressed to the Oahu Junk Company?

A. Most of them.

Q. And delivered to the Oahu Junk Company? But Yamamoto was the correspondent; he knew Japanese better than Tsutsumi and Tsuda and therefore he answered the letters and probably read them, too, is that right?

A. That's right.

(Testimony of Robert Kiyoichi Murakami.)

Q. Now, where did you see any of this correspondence, [110] in your office?

A. Some correspondence come from Japan, and they'll bring the thing along with them.

Q. Did they bring it to your office?

A. To my office some time.

Q. From the Junk Company offices?

A. That's right.

Q. And did they keep their correspondence in the Junk Company offices?

A. As far as I know.

Q. As far as you know, all of the correspondence between Oahu Junk Company and Yotaro Fujino was kept at the Oahu Junk Company offices?

A. Yes.

Q. Now, have you, since this case began, asked them to search out and produce the correspondence between Yotaro Fujino and Oahu Jung Company?

A. Yes.

Q. And have they produced any correspondence?

A. One or two, a few of them relating to the subject matter.

Q. The other day you showed me two sets of letters, one letter, single letter, and the other one a combination of three letters. Are those the only ones that they were able to produce? [111]

A. I think I showed all of them to you at that time, if I am not mistaken. Of course, those were not produced just before you came; those were in a long time. The Alien Property Custodian's Office had access to that, too, all this time.

(Testimony of Robert Kiyochi Murakami.)

Q. Well, who has had, who has kept those letters?

A. I think as far as I know, Kaname brought them in.

Q. Kaname brought them in the other day?

A. Yes. Maybe one or two of them we had in Mr. Beebe's office now.

Q. Is that all the correspondence that there is, as far as you know, relating to any of the transactions that you have testified about?

A. As far as I know, yes.

Q. You asked them to produce all the correspondence?

A. I told them to go through the files, whatever they have, telegrams or letters or what notes.

Q. And do you recall seeing any other correspondence than that that was produced by Kaname?

A. A lot of times when they come in and bring the letters, of course they don't always bring the letters, they come in and consult me with the subject matter without bringing the letters, but other times they bring the letters. I know these are not the only ones. I have seen others, too.

Q. Have you asked them to produce the others?

A. I asked them to check everything what they had. [112]

Q. And these two that you showed me the other day are all that have been produced?

A. That's right, two or three, I guess maybe one is a postscript.

(Testimony of Robert Kiyoichi Murakami.)

Q. One group together?

A. Two groups together.

Q. Two separate groups of letters? One is a single letter and the other is three letters? And that's all that you have produced as far as you know?

A. That's right.

Q. Let me see again. Do you have any independent recollection of any other correspondence regarding these transactions that you have testified about than those letters that were produced and shown to me the other day?

A. I don't have any independent recollection of any particular letter.

Q. Do you have any recollection that there were other letters?

A. There were other letters.

Q. Where they are now, of course you don't know?

A. I don't know. I have been only informed. I don't know myself.

Q. Were you in Japan in 1940 on a vacation trip?

A. Yes.

Q. Had you planned to see Yotaro Fujino before you left for Japan? [113]

A. Yes.

Q. Had you discussed with his attorneys-in-fact here your forthcoming trip before you left?

A. Yes.

Q. Talked about the various problems of the business?

A. Yes, but more particularly with Mr. Yamamoto. I did talk with the attorneys-in-fact, too, but the main portion of the talk I think was with Mr. Yamamoto.

(Testimony of Robert Kiyoichi Murakami.)

Q. That's the man who is dead?

A. That's right. That's the man who is the advisor, who was the advisor.

Q. You mean he occupied some other position than that as correspondent?

A. Yes, in the sense that he is the one that was consulted on all important matters, matters of policy, etc., and who was Mr. Fujino's number one advisor, I would say.

Q. When did he die?

A. As I said, he died while he was away on company business down in Manila or Hongkong, or while on ship in 1941.

Q. After the incorporation and after these transfers? A. Oh, yes; oh, yes.

Q. Well, now, where was it that you saw Yotaro Fujino in Japan?

A. At his own home and also while vacationing together.

Q. And at his own home where? [114]

A. Tokyo.

Q. Did you also see his wife? A. Yes.

Q. And did you also see Kaname? A. Yes.

Q. And these talks that you had with Yotaro Fujino in Japan, who was present besides you and Yotaro? A. Two of us.

Q. Just the two of you?

A. Just two of us. Of course, his wife may have come, and you know, in and out, and maybe Kaname's cousin may have come in and out but didn't—

Q. (Interposing): Who is Kaname's cousin?

A. Tatao.

(Testimony of Robert Kiyochi Murakami.)

Q. Is he the one that wrote some of these letters that you showed me the other day?

A. That's right.

Q. But actually conversations, as I understood, were between you and Fujino, Yotaro Fujino, alone?

A. That is true.

Q. And whatever you talked about you talked between you two?

A. Yes.

Q. So one might have been in the room or in and out but they didn't take part in the conversations? [115]

A. That is correct.

Q. And Kaname at no time took part in the conversations?

A. No.

Q. Now, did you advise Yotaro at that time of your experience in transferring property from nationals of Japan to citizens of the United States and the advisability for that?

A. Well, I told him about transferring property from father to son.

Q. I mean with relation to the ownership of property in nationals of Japan to transfer the title to United States citizens, that is, American-born or citizens in some other form?

A. No, not in that sense. If you mean just to make a transfer on the face of it. I didn't advise him anything of that kind.

The Court: You did not?

The Witness: I did not. I did not advise him to just make a transfer of title merely for the sake of transferring only the legal title, if that is what you mean.

(Testimony of Robert Kiyochi Murakami.)

Q. Well, you had had some experience in the transfer of property from—real or personal—from nationals of Japan to citizens of the United States for the purpose of merely transferring the title, had you not?

A. I wouldn't say that. For instance, the old man comes in and he wanted to give his home to his kid. I don't know whether you'd call that just merely for the purpose of transferring title. They'd come and ask me to make the transfer [116] to the young fellow. I'd take it for granted that he is giving it to the child and that child can do what he wants with it.

Q. You merely took that for granted?

A. Yes.

Q. You never inquired with regard to any consideration that might pass between the parties?

A. Well, I took it that when he said he was going to give it to him that it is a pure and simple gift and advise him if it is a gift, and if it is a sufficient amount asked him how much the value of the property is, and that it would be necessary to file a gift tax return, and those things were always discussed, you know.

Q. Now, you had some experience, for example, with the transfer of sampans? A. Yes.

Q. After the Customs Department started making trouble for Japanese nationals who were owners of sampans, had you not?

(Testimony of Robert Kiyoichi Murakami.)

A. I wouldn't say before or after. I know that transfers were made before, too, and I am not sure about after, after the Customs began investigating somewhere in 1940 or '41.

Q. That was in 1939, was it not?

A. Thirty-nine was it?

Q. And many of those transfers were mere transfers of title without consideration, were they not?

A. Well, I wouldn't say many of them. We had only a few, I think.

Q. Some of them were? [117]

A. Some of them pure and simple gifts.

Q. You consider them as pure and simple gifts?

A. Pure and simple gifts they were, some of them.

Q. And when you talked with Yotaro Fujino, did you discuss with him the international situation?

A. That also came up.

Q. And you recognized at the time in 1940 that there was strained relationship between the United States and Japan?

A. There was such talk, although Mr. Fujino didn't think there was——

Q. There was a lot of talk about it at that time, wasn't there? A. Considerable talk.

Q. That was also discussed between you and Yotaro Fujino at the time in 1940?

A. Yes, that came into the subject matter, that is what we discussed.

(Testimony of Robert Kiyoichi Murakami.)

Q. That was a part of the picture? With regard to the corporation, Yotaro Fujino, I think you testified, told you that he wanted to put the sum of the stock in the name of his children but wanted to control it in some fashion, and these notes that were later given was the advice that was used to carry on that intention, is that my understanding?

A. When he asked me how he might have some measure of control for the time being over stock that he gave or wanted [118] to his children, I said, of course, once you give it the kids if they wanted to sell it and they do it, that is your hard luck and nobody can do anything about it. Well, he asked me, well, how can I just to see, for instance my kid Kaname is going to behave and if he is all right or not. Well, I said, if you want to you can take it back as a pledge. You can sell it to him, take the note back and pledge, get a pledge of the shares; then he can't just go ahead and sell it out without you knowing anything about it. And if you want to any time you can later on cancel the note and let go completely of you can, if you want to, give him five thousand dollars this year and the next five thousand dollars and take advantage of the so-called exemption under the gift tax. In other words, at that time in Japan he hadn't said exactly what he was going to do. He wanted to know everything.

Q. He wanted to know for sure that if he did transfer this stock to Kaname and the children

(Testimony of Robert Kiyoichi Murakami.)

that he would have some control over it so that if Kaname didn't behave himself, as you said, he would have that measure of control?

A. He asked me, if he wanted that how I might devise the means. And I said, well, you might do this. Or, I said, you can give him just a little bit to start with and see how he behaves and then give some more. There are a lot of ways but that is one of the ways.

Q. And subsequently, when the corporation was formed, [119] two hundred shares of stock were issued to Kaname and he gave in exchange a note for twenty thousand dollars?

A. That's right.

Q. And as a pledge he secured the shares of stock on that note? A. That's right.

Q. And the sisters each received one hundred seventeen shares and they gave back a note for eleven thousand six hundred dollars?

A. Eleven thousand six hundred or seven hundred, I don't know.

Q. They had a qualifying share?

A. I think you are right.

Q. Eleven thousand six hundred. And in the same fashion pledged the stock to secure the payment of the note, is that right?

A. Yes. I'm not sure about it, one hundred seventeen or one hundred sixteen, but anyway the shares went back as a pledge for that.

(Testimony of Robert Kiyochi Murakami.)

Q. And that was to carry out this original plan that Yotaro and you had discussed in Tokyo or when you were in Japan?

A. That's right. But I would like to tell you right there that it wasn't definitely decided that is what he was going to do.

Q. You mean when you were in Japan it wasn't definitely decided that that is what you were going to do but when the plan was carried out that plan that you had discussed was carried in effect? [120]

A. That's right.

Q. Now, the land, was carried on the books of Yotaro Fujino as an individual trader as an asset of his business?

A. No, on that point I am not positive.

Q. But in any event most of the land involved in this transfer to Kaname, with some exception, was land on which the business of Yotaro Fujino is located?

A. That's right.

Mr. Jansen (to Mr. Beebe): Have you got a map of that? I have it if I can find it.

The Court: Would you like a recess?

Mr. Jansen: Yes, your Honor.

(A short recess was taken at 11:15 a.m.)

After Recess

The Court: You may proceed.

Mr. Jansen: I think we might as well, if it please the Court, clear up the location of the property at this time. I think it might make it easier as we go along.

(Testimony of Robert Kiyoichi Murakami.)

The Court: Very well.

Q. (By Mr. Jansen): There are six parcels of property involved, are there not?

A. I believe so.

Mr. Jansen (To the Clerk): Will you mark

The Clerk: As an exhibit?

The Court: If they are going in as an exhibit, he may as well mark them now. [121]

Mr. Beebe: We have no objection to them going in as exhibits.

The Clerk: Defendant's exhibits 1, 2, and 3.

(Three maps, Defendants Exhibits 1, 2 and 3, were received in evidence.)

Mr. Jansen: Now, if it please the Court, I have shown Mr. Beebe these exhibits, Defendant's Exhibits 1, 2 and 3, and they are drawings disclosing the location of the various parcels of land involved in this case. And on each of the parcels they are marked "V.O.", "V.O. 2724," which means Vesting Order 2724. And then Exhibit A, Parcel 1, Exhibit A was attached to the Vesting Order and described the property. There are parcels 1, 2, 3, 4, 5 and 6 consecutively. And on the original exhibits those identifications are marked in red ink. I will offer these in evidence.

The Court: They are already in.

Q. (By Mr. Jansen): Now, Mr. Murakami, will you lay these exhibits here next to you. Exhibit 1, which is this (showing a map), includes four of the parcels of property involved, parcels 1, 2, 3 and 4. And Exhibit 1 shows on the top side of the Ex-

(Testimony of Robert Kiyoichi Murakami.)

hibit King Street running in front of parcel 1. Now, on parcel 1, is that where the office of Oahu Junk Company is located? A. That's correct.

Q. And behind Parcel 1, you have two other parcels, 2 and 3, and are some of the facilities of Oahu Junk Company [122] located on those parcels? A. That's correct.

Q. Now, behind parcels 2 and 3 is a parcel of land which is shown as owned by the Bishop Estate. That parcel of land, in fact, is rented by the Oahu Junk Company and used by them, is it not?

A. That is my understanding, that's correct.

Q. And so their facilities are on that parcel also. And then their facilities—behind the Bishop Estate property is parcel 4?

A. That's correct.

Q. And facilities of the Oahu Junk Company are also on there?

A. That's right, I think that is correct.

Q. And behind parcel 4 is the right of way of the Oahu Railroad, and across the right of way is parcel number 5? A. Yes.

Q. Now, are some of the facilities of the Oahu Junk Company also on this parcel?

A. As I understand it, there may have been some, and some other matter there, but that piece is now rented out and being used by Igarashi, a contractor by the name of Igarashi.

Q. And who is he? A. He is a citizen.

Q. No. I mean, what does he do?

A. Contractor, contracting business. [123]

(Testimony of Robert Kiyoichi Murakami.)

Q. But the parcel——

A. I think he has repair for heavy equipment, some such business also.

Q. ——the parcels of land, 1, 2 and 3, the parcel that is rented from the Bishop Estate, 4 and 5, are reasonably contiguous to each other, are they not?

A. They are.

Q. And then parcel 6 is an isolated parcel over on what road is it? A. Waiakamilo road.

Q. Would you say about a block away from the others? A. Yes, I guess.

Q. And a much smaller parcel?

A. A smaller piece.

The Court: What is parcel 6, a home site?

The Witness: It is not—yes.

Q. It is unimproved?

A. Yes, unimproved. I think it is one of those that is not used in connection with the business. As to these matters, I think the attorneys-in-fact know better than I do.

Q. Now. parcels 1, 2 and 3 and the Bishop Estate parcel, and parcel 4, were used by the Oahu Junk Company when they were in the individual ownership of Yotaro Fujino?

A. That is true.

Q. At the time of the transfer the facilities of the [124] Oahu Junk Company were on these five pieces of property, the five including the Bishop Estate parcel?

A. Yes, I think that is true.

(Testimony of Robert Kiyochi Murakami.)

Q. But the real estate was not included in the transfer from Yotaro Fujino to the Oahu Junk Company? A. Was not included.

Q. Is that right? A. Yes.

Q. And the Oahu Junk Company in consideration of the transfer of the personal property, the business of Yotaro Fujino, the good will and all that goes with it, assumed all of Yotaro Fujino's obligations in the business?

A. Except certain small items of obligation maybe. I'm not sure that it is absolutely all now. It is in there.

Q. Do you have the copy of the bill of sale between Yotaro Fujino and the Oahu Junk Company?

A. I should have one. The original should be with the Oahu Junk Company.

Q. I think we should have that.

A. I think you have one, too. It was furnished to your office.

Q. Well, I will show you this and ask you if you recognize this as being a true copy of the bill of sale from Yotaro Fujino, as an individual, to the Oahu Junk Company? (Showing a document to the witness) [125]

A. Yes, I believe this is the true copy. It looks—I don't know whether it's a duplicate of the original but it appears to be the correct copy.

Mr. Jansen: Well, I'll have no objection to verifying it.

(Testimony of Robert Kiyochi Murakami.)

Mr. Beebe: Well, subject to checking and verifying, it may go in.

The Court: Very well. Government's Exhibit—

The Clerk: No. 4.

(Defendant's Exhibit No. 4 was received in evidence.)

[Defendant's Exhibit No. 4 set out on pages 449 to 454.]

Q. (By Mr. Jansen): And the bill of sale,—we'll call it that—the agreement is executed by Yotaro Fujino through his attorney-in-fact and by the Oahu Junk Company by its vice-president and treasurer? I mean both parties were parties to the agreement.

A. That is true.

Q. And under the provisions of this agreement the Oahu Junk Company assumed all of the obligations of Yotaro Fujino doing business as Oahu Junk and Oahu Hardware, is that right?

A. That is true.

Q. And those obligations I think you have already testified were for the most part obligations to the Bishop Bank in the sum of \$20,000?

A. That was the biggest item.

Q. Yes.

A. But there were others, too. [126]

Q. I think you will find attached here—

A. Yes, \$20,000 to the Bishop Bank was the biggest item, outside of the accounts payable and other temporary deposit accounts, etc.

(Testimony of Robert Kiyochi Murakami.)

Q. And of the \$20,000, \$1,500 was the secured obligation, secured on the real estate, secured by the real estate?

A. Secured by real estate. I'm not sure which, but one or two of the parcels.

Q. Not all of the parcels?

A. Not all. One or two.

Q. And the rest of the obligations to the Bishop Bank, in the sum of \$20,000, were unsecured?

A. Unsecured.

The Court: Wait a minute. This mortgage for \$20,000 to the bank,—it was after the transfer—

The Witness: It was unsecured except as to one thousand five hundred dollars.

The Court: —it was thereafter that the mortgage to the bank was executed?

The Witness: That is true, thereafter.

The Court: All right.

Q. (By Mr. Jansen): It was after the transfer of the personal property, the good will, the business of the Oahu Junk Company and the Oahu Lumber and Hardware Company to the Corporation that the mortgage [127] to the bank was executed?

A. Yes. It was actually, the actual execution was after, although it was intended as almost a simultaneous transaction, but as I explained in the direct examination we had to go and get the new power of attorney, etc., and so it was delayed. But the understanding with the bank was that we were going to secure that mortgage on Yotaro Fujino's real property.

(Testimony of Robert Kiyoichi Murakami.)

Q. Well, then, if I understand you correctly, at the time the corporation was organized it was contemplated that the real estate would not be transferred to the corporation?

A. That is correct.

Q. That the business, outside of the real estate, would be transferred to the corporation?

A. That is true.

Q. The corporation would assume all of Yotaro Fujino's obligations?

A. Yes.

Q. That is correct?

A. Correct.

Q. But notwithstanding that, Yotaro Fujino would give a mortgage on his real estate for \$15,000 to the Bishop Bank?

A. That is true except that I think the \$15,000 was later written down as \$15,000. At the time we thought it was going to be for the whole \$20,000. That is, it was our understanding.

Q. So far as you understood it, at the time of the [128] incorporation it would have been for the full amount of the indebtedness of Oahu Junk.

A. To the bank.

Q. To the bank?

A. That's right.

Q. That Yotaro Fujino would execute a mortgage on his own personally-held real estate to cover the debt of the Junk Company, the corporation, to the bank?

A. Yes. The debt of the corporation was assumed—the original of Yotaro Fujino's personal debt—

(Testimony of Robert Kiyoichi Murakami.)

Q. (Interposing): Yes, but in exchange for the property of the business the corporation assumed all of his personal debts?

A. That is true.

Q. And notwithstanding their agreement to assume the debt, Yotaro was to execute this mortgage to the bank at first thought to be for the full amount of the debt? A. Yes.

Q. A mortgage on his own personally-held real estate? A. That is true.

Q. Real estate that was excepted from the deal between the corporation and Yotaro?

A. That is true.

Q. And the fifteen thousand dollar mortgage that was later executed by the attorneys-in-fact for Yotaro Fujino in [129] March, 1941, was to carry out that originally-understood transaction?

A. That is true.

Q. And the stock of the corporation that was issued contemporaneously with this transaction we have been discussing was issued, 200 shares to Kaname Fujino? A. That's right.

Q. One hundred seventeen shares to his sister?

A. That's right.

Q. One hundred seventeen shares to his other sister? A. That's right.

Q. And how many shares to Yotaro?

A. I believe it was 240.

Q. And 117 shares to Chiyono Fujino?

A. That's correct.

(Testimony of Robert Kiyoichi Murakami.)

Q. Chiyono Fujino, Yotaro's wife?

A. That's right.

Q. So after the stock of the corporation was issued there would be 800 shares outstanding?

A. Yes, 800 shares.

Q. Three of them held by Yamamoto, one each, Yamamoto, Tsuda and Tsutsumi?

A. Correct.

Q. Qualifying shares? A. Correct.

Q. That's right? Two hundred forty shares by Yotaro? [130]

A. That's right.

Q. And 117 shares by Chiyono?

A. That's right.

Q. And Yotaro and Chiyono were both nationals of Japan? A. Yes.

Q. Their interest, then, at the time that their stock was issued represented a minority interest in the corporation? A. Let me see.

Q. Two hundred forty and one hundred seventeen is three hundred fifty-seven.

A. Minority interest.

Q. Because Kaname's and his sisters' shares would be four hundred and thirty-four, wouldn't it? Is that right? A. Correct.

Q. And two shares held by Tsuda and Tsutsumi, who were also both citizens of the United States, would even up that a little bit, and it would be four hundred thirty-six shares held by citizens of the United States? A. That's right.

(Testimony of Robert Kiyoichi Murakami.)

Q. So the majority holding in the corporation at the time the stock was issued—and that has never been changed since, has it? I mean in proportions.

A. Wait a minute. I don't know, because there was some stock dividends.

Q. Ten thousand dollars. But the dividend upon the [131] amount of stock held by each stockholder—they received a proportionate amount. The overall proportions remained the same.

The Court: I'm not clear in my mind about this stock. Originally the corporation was a corporation organized on a thousand dollar capitalization?

Mr. Jansen: That's right.

The Court: And who were then the stockholders?

Mr. Jansen: The incorporators.

The Witness: Yamamoto had one share, Tsuda had one share. Tsutsumi had one share.

Mr. Jansen: The two sisters.

The Witness: The girls. Katsue had one share, one or two, I'm not sure, maybe two, two a piece maybe, two a piece for the two girls. And Yotaro had one share.

Mr. Jansen: One share?

The Witness: One or two shares.

The Court: Well, I don't know if it is going to be important?

The Witness: All told there were ten shares.

The Court: Ten in all?

The Witness: Ten in all, a hundred dollars par, a thousand dollars.

(Testimony of Robert Kiyochi Murakami.)

Q. Well, the 10 shares were held, two by Yotaro and one by Chiyono? [132]

A. One by Chiyono.

Q. Well, look at the minutes and get it right there.

A. That's right, two shares by Yotaro Fujino and one share by Chiyono Fujino.

The Court: That's the mother?

The Witness: Mother. Two by Katsue Fujiaki, the elder daughter, two by Shizue Maneki, the younger daughter; one by Tekuichi Tsuda, one by Yasuo Tsutsumi, one by S. Yamamoto.

Q. Those are the original ten shares under the original one thousand dollar incorporation?

A. That's right.

The Court: Then the next increase of capitalization of the 790 shares—240 were held by Yotaro?

The Witness: No, I say 238 was Yotaro.

The Court: One hundred seventeen by the boy, one hundred seventeen by each girl.

Mr. Jansen: No, two hundred by the boy.

The Court: Two hundred? One hundred seventeen by each of the girls, and the mother.

The Witness: One hundred seventeen by each of the girls, and according to this (referring to a book), one hundred eighteen to the mother.

The Court: One hundred eighteen to the mother. All right. I think that adds up right now.

(Testimony of Robert Kiyochi Murakami.)

Q. Then when the stock, when the 790 shares were issued, there were actually outstanding 800 shares because you had the [133] original ten shares? A. That's correct.

Q. And then when the stock dividend was later declared, so that you had outstanding 800 shares, the dividend was received by each of the stockholders in proportion to his holdings?

A. That's correct.

Q. So the proportion remained the same?

A. That's right.

Q. Did not the two powers of attorney that Yotaro Fujino had previously executed give the attorneys-in-fact power to mortgage property with the Bishop Bank? A. I think they did.

Q. But you considered it was advisable to have a new power of attorney?

A. Well, that was the situation. As I said, one of the pieces that—the last piece, parcel number 6—was the one which was Land Court title, in which his name was registered as Y-o-o-t-a-r-o Fujino, and I don't know whether there was another one with that title but particularly the one with the Land Court having been in one name and the difficulty with the Land Court, Assistant Registrar of the Land Court's Office as to the power of attorney—there had been two powers of attorney outstanding and no identification of the two referring to the same man, etc., and it was the combined opinion of the bank and myself, as I re-

(Testimony of Robert Kiyoichi Murakami.)

call, that we thought it was the best to get a new one, mentioning the fact that Yotaro is also known as [134] Y-o-o-t-a-r-o, also with the provision as to where their residence and post office address was, so that we could make a mortgage covering not only one type of property but the other type of property and pass it through the record office.

Q. And it was for the purpose of executing this mortgage and carrying out the general plan that you obtained this last power of attorney from Yotaro Fujino?

A. That is true, to execute the entire plan of transfer of mortgage and everything.

Q. Now, at the time the stock was issued to Kaname and his two sisters contemporaneously with the issuance of the stock, the notes were obtained back from Kaname and his two sisters?

A. Well, from the two sisters, yes, individually they signed.

Q. They individually signed?

A. Then another problem came up. Kaname was not here, and except for an understanding that these two gentlemen, Tsuda and Tsutsumi, would act for him as attorney-in-fact, we didn't have the power of attorney back from Kaname yet. But nevertheless we made them sign it and the power of attorney did come back within a short time.

Q. You had a power of attorney on the way from Kaname to Tsutsumi and Tsuda?

A. That's right.

(Testimony of Robert Kiyochi Murakami.)

Q. And they executed the note for Kaname?

A. That's correct. [135]

Q. His note was for twenty thousand and the girls' notes were for each eleven thousand six hundred? There might be a difference of a hundred?

A. I don't know, eleven thousand some odd hundred dollars.

Q. And those notes were to cover the purchase price of this stock and pledge—the stock was pledged as security for the notes?

A. That is correct.

Q. And that was recited in the minutes of the corporation and all that? A. That is true.

Q. Well, now, when this deed was executed, signed by the attorneys-in-fact to Kaname——

The Court: Exhibit "H".

Q. ——Exhibit "H", yes, Kaname wasn't actually in this country, was he?

A. He was physically in Japan yet.

Q. Physically in Japan? When was this deed, Exhibit "H", delivered to Kaname?

A. Now, the only thing I can say, the only way I can answer that, is by hearsay, but it was executed in our office; and my personal, best recollection, is that Mr. Tsuda was the one that took it down to the bank.

Q. Took it where?

A. Down to the Bishop Bank.

Q. Well, was this deed ever in fact delivered to Kaname [136] Fujino? A. Yes.

(Testimony of Robert Kiyoichi Murakami.)

Q. When?

A. As I say, I can't be talking from my personal knowledge now because I don't know. I didn't witness that actually. But from refreshing our memory, and so forth, the deed was taken by Mr. Tsuda to the bank with instructions to go—I told him, go ahead and pick up the transfer certificate of title, the Land Court certificate of title, there and then take it up to record it; because it involved one Land Court title and the mortgage covered that particular piece, too, and the Bishop Bank had that transfer certificate of title.

Q. But Kaname himself was never actually here to receive delivery of this deed, was he?

A. No. He came back and took delivery and took it down to the record office.

Q. Who took it down to the record office?

A. The best I can figure it out is that he took it down himself.

Q. You mean after he came back to this country?

A. Yes, yes.

Q. Well, how about the attorneys-in-fact for Kaname? Couldn't they accept delivery of the deed?

A. Well, they had it, you know.

Q. They had it?

A. Mr. Tsuda had it immediately after it was executed. [137] And as I say, my recollection is that I told him to take it down to the bank and borrow that transfer certificate of title and record it.

(Testimony of Robert Kiyoichi Murakami.)

Q. Your recollection is that you told him to do that? A. Yes.

Q. And that was in March, 1941?

A. Yes, in March, 1941, yes.

Q. At that time Tsuda and Tsutsumi were attorneys-in-fact for Kaname?

A. That's right.

Q. And it was your instructions to them to take the deed, get the certificate of title and file the deed. But in fact they didn't do that, did they?

A. The fact is that they did not actually carry out all that, as I later learned.

Q. The deed was not actually filed of record until May, 1941?

A. That is correct. The record shows that, too.

Q. And you know of no reason why they delayed the filing of the deed, of your own knowledge?

A. Not of my own knowledge. That's why I'm telling you that I don't know.

Q. Was the power of attorney from Kaname to Tsuda and Tsutsumi in their hands at the time that deed was executed in March, 1941?

A. You are referring to Kaname's power of attorney? [138]

Q. Kaname's. A. That's right.

Q. Did they have that power of attorney then?

A. They had that power of attorney.

Q. You are sure of that?

A. I am sure of that. I don't know whether they had it physically there at the time.

(Testimony of Robert Kiyoichi Murakami.)

Q. No, I mean they had received it from Kaname in Japan.

A. Yes. And, as a matter of fact, it had been recorded there prior to that.

The Court: It is now 12 o'clock, gentlemen. I am a little confused on what our schedule was. My thought is that we are going on this afternoon. Would it be advantageous to adjourn now and resume shortly after one?

Mr. Jansen: One-thirty. Or would you rather start a little earlier?

The Court: Whatever you want to do.

Mr. Beebe: I'd rather start at one-thirty. I noticed you Honor's face fall a little bit. I thought maybe I misread it.

The Court: No, one-thirty is all right. I am trying to use all the time we can.

(The Court recessed at 12 o'clock, noon.)

Afternoon Session

The Court: The same witness is on the stand and is still under oath. You may proceed.

ROBERT KIYOICHI MURAKAMI

a witness in behalf of the plaintiff, having previously been sworn, resumed and testified further as follows:

Mr. Jansen: I have no further cross-examination.

Redirect Examination

By Mr. Beebe:

Q. Mr. Murakami, you stated in your cross-examination that Kaname was not here at the time

(Testimony of Robert Kiyochi Murakami.)
that that was executed. Do you know when Kaname returned to the Territory of Hawaii?

A. Shortly thereafter, I think the first part of May of the same year.

Q. The first part of May of the same year? By that you mean the year 1941? A. Yes.

Q. Now, at the time of transfer of the property to Kaname, do you know whether or not he made a gift for tax returns?

A. That was thereafter.

Q. That is after his return to the Territory?

A. Yes.

The Court: Excuse me. You are asking who made a gift tax return?

Mr. Beebe: Kaname.

The Court: That is the Plaintiff? [140]

Mr. Beebe: Yes, Kaname Fujino. May the record show that when I referred to Kaname, I was referring to Kaname Fujino?

The Court: Yes, I understood, but I thought whom you meant should make the gift tax return. So the question is, did he to your knowledge make a gift tax return subsequent to his return in May, 1941?

The Witness: Yes.

The Court: He did?

The Witness: He did.

Q. (By Mr. Beebe): Do you know whether that gift tax return was made by Kaname or Yotaro through his attorneys-in-fact?

(Testimony of Robert Kiyochi Murakami.)

A. As far as I know, by both, that is, donor and donee.

Q. Directing your attention to a green document, which is stamped "Client's Copy" and has in its heading "Gift Tax Return; Calendar Year 1941; Donor, Yotaro Fujino; Address, 1217 North King Street; Citizenship, National of Japan; Residence, Tokyo, Japan," and to a check attached thereto dated March 16, 1942, drawn on the Bishop National Bank of Hawaii at Honolulu, and payable to the order of Collector of Internal Revenue, being for the amount of \$779.63, having stamped "Yotaro Fujino by Tsuda and Tsutsumi,"—I can't figure the initials—I will ask you if you ever saw that document, the original of that document and the check? (Handing a document to the witness.)

A. The original of this document, entitled "Gift Tax Return," I saw. I believe I checked it. It wasn't prepared by myself but by the accountant, C.P.A.'s. As far as the check, [141] I have seen this before but I don't know whether or not I saw it at that time. I don't recall.

Q. I'll wait, then,—

A. Maybe I saw it, as a matter of fact.

Q. —I'll take care of that later. Now, after the transfer of the property, as indicated by—Exhibit "H," is it?—the deed—

The Court: Yes, "H."

Q. —do you know whether or not, or do you know of your own knowledge whether or not any

(Testimony of Robert Kiyoichi Murakami.)

rental was paid by the corporation to Kaname, of your own knowledge?

A. I wouldn't say of my own knowledge.

Q. I see. All right. Going back to Seichi or Seitaro Yamamoto, did he have an office or rather a desk in the Oahu Junk Company premises?

A. I'm not sure whether or not he had a separate desk now. He was there all the time.

The Court: Who was this, again?

The Witness: Seitaro Yamamoto.

The Court: Oh.

The Witness: The other gentleman.

The Court: But you are not sure whether he had a desk?

The Witness: I'm not sure whether or not he had a separate desk by himself or whether any particular desk was assigned to him. [142]

The Court: And this would be true both before and after the corporation was formed?

The Witness: That is true because most of the time he came down in the office, to my office.

Q. (By Mr. Beebe): Now, after the corporation was formed, so far as you observed was there any difference in the position of Yamamoto as far as Oahu Junk Company was concerned?

A. Well, he became one of the directors. Prior to that, of course, he was a personal advisor to Mr. Fujino and also the advisor to the two attorneys-in-fact who were respectively manager and assistant manager of the enterprise.

Mr. Beebe: I think that is all, Mr. Murakami.

(Testimony of Robert Kiyochi Murakami.)

The Court: Recross?

Mr. Jansen: No further questions.

The Court: You are excused.

(Witness excused.)

Mr. Beebe: At this time, if your Honor please, I'd like to introduce in evidence power of attorney from Kaname Fujino, Honolulu, City and County of Honolulu, Territory of Hawaii, followed in brackets by "Temporarily Residing in Tokyo, Japan," wherein he constitutes Tokuichi Tsuda and Yasuo Tsutsumi, of Honolulu, as his attorneys-in-fact; the document being signed the 12th day of December, 1940, by Kaname Fujino, and the acknowledgement having been taken before David Thomasson, Vice Consul [143] of the United States, on the 12th of December, 1940; the document having been recorded on the 3rd day of March, 1941, in the Bureau of Conveyances in Liber 16330, on pages 53-5.

Mr. Jansen: No objection.

The Court: Very well. It may be received as Exhibit "I." Is that right?

The Clerk: "I" would be the next one.

(Plaintiff's Exhibit "I" was received in evidence.)

[Plaintiff's Exhibit "I" set out on pages 509 to 512.]

The Court: You may call your next witness.

Mr. Beebe: I will call Kaname Fujino.

KANAME FUJINO,

a witness in his own behalf, being duly sworn, testified as follows:

The Court: You are the Plaintiff in this action?

The Witness: Yes.

The Court: Your age?

The Witness: Twenty-seven.

The Court: Residence?

The Witness: Honolulu.

The Court: Occupation?

The Witness: Executive.

The Court: What?

The Witness: Oahu Junk Company.

The Court: And your citizenship?

The Witness: U.S.A. [144]

The Court: Exclusively?

The Witness: Yes.

The Court: You may take the witness.

Direct Examination

By Mr. Beebe:

Q. When were you born, Kaname?

A. February 23, 1919.

Q. And where were you born?

A. Honolulu, T. H.

Q. Can you tell us where in Honolulu you were born?

A. Niepers Lane, N-i-e-p-e-r-s.

Q. Directing your attention to Government's Exhibit No. 1, which is a map of various properties, I notice on the map a lane, Niepers Lane, opening into King Street alongside of parcel 1 as

(Testimony of Kaname Fujino.)

shown on Exhibit 1. Is that the lane upon which you were born? (Showing a map to the witness.)

A. Yes.

Q. On which piece of property was it that you were born, if you can show it?

A. This is King Street (indicating). I was born right here opposite Oahu Junk, right next to Oahu Junk (indicating).

Q. You were born next to Oahu Junk?

A. Opposite the tested property.

Q. It has a designation in the lefthand corner, 22? A. Yes. [145]

Q. Parcel 1 being designated on Exhibit 1 as 23? A. Twenty-two.

Q. No, but parcel 1 on this map, Exhibit "A," is 23? A. Yes.

Q. And you were born on the parcel shown in black or blue ink as 22, is that correct?

A. That is correct.

Q. Your father's name was what?

A. Yotaro Fujino.

Q. And your mother's name?

A. Chiyono Fujino.

Q. Have you any brothers or sisters?

A. I have two elder sisters.

Q. Their names are now what?

A. Mrs. Katsue Fujieki and Mrs. Shizue Moneki.

Q. You were the only son, then, in the family?

A. Yes.

(Testimony of Kaname Fujino.)

Q. Have you resided here in the Territory all of your life? A. No.

Q. When was the first time that you left the Territory, Kaname?

A. That was when I was about five years old.

Q. Where did you go? A. To Japan?

Q. With whom? [146]

A. With my mother.

Q. Remaining in Japan for how long a period of time? A. About three or four months.

Q. That was along in 1924 or '25?

A. Yes, about that time.

Q. Now, then, did you remain in Honolulu all the time thereafter? A. No.

Q. When did you next leave the Territory of Hawaii, Kaname? A. August 7, 1934.

Q. And you were at that time about fifteen years of age, were you? A. Yes.

Q. And what schooling had you had here in Honolulu up to August 7, 1934?

A. I finished intermediate school.

Q. By that you mean junior high school or what?

A. Yes, I finished Kalakaua Junior High School.

Q. I see. And what was the occasion of your going to Japan then on August 7, 1934?

A. On just—at my father's say to take a trip there.

Q. Did you go to school while you were in Japan? A. Yes, I did.

(Testimony of Kaname Fujino.)

Q. What school did you attend in Japan? [147]

A. Waseda Business School.

Q. Business school? A. Yes.

Q. Is that a part of Waseda College or entirely distinct and separate? A. Independent.

Q. And where is Waseda Business School?

A. In Tokyo.

Q. How long did you attend Waseda Business School? A. Six years.

Q. Is that the length of any particular course that you took?

A. Yes, it is a six years' course.

Q. Now, what course did you take——

A. Majored in——

Q. ——in Waseda Business School?

A. ——majored in business subjects.

Q. How would you characterize that if you went to a college here?

A. Oh, just like Honolulu Business College. They teach you typing, bookkeeping, accounting, English courses, correspondence in English, business letters.

Q. I see. And did you study both English and Japanese while you were in this school?

A. Yes. [148]

Q. And it was approximately the same as a business college here? A. Yes.

Q. Except that the course took six years, is that right? A. Yes.

(Testimony of Kaname Fujino.)

Q. When did you finish your course in Waseda Business School or College?

A. March, 1941.

Q. Then you attended from approximately—when did you start school?

A. April, 1935.

Q. You were how old when you graduated, or did you graduate? A. Yes.

Q. How old were you when you graduated?

A. Twenty-two years old.

Q. Now, when did you return from Japan to the Territory of Hawaii?

A. I reached here May 4, 1941.

Q. And you left Japan at what time?

A. April 26, 1941.

Q. Do you know whether or not at the time of your birth or soon thereafter whether you were registered at the Japanese Consulate?

A. I wouldn't know.

Q. Well, while you were in Japan did you take any steps toward expatriating yourself? [149]

A. Yes, I did.

Q. What steps did you take and what was the result?

A. We had to go through this Home Ministry and go through all kinds of red tape, and then they notified me that I had expatriated from the Japanese citizenship.

Q. Did you receive any document or paper of any kind showing that you had expatriated?

(Testimony of Kaname Fujino.)

A. Yes, I think I sent it to the place that my parents were born. That's where the family record was registered. I think that's where they sent it. My father sent it for me to let them know that I had been cut off from the Japanese citizenship.

Q. Did you receive anything from the Consulate here in Honolulu indicating that according to their records you were expatriated?

A. Yes, on one occasion I had to get it so I did receive confirmation from the local Japanese Consulate.

(Mr. Beebe shows a document to Mr. Jansen.)

Q. Now, you made your application, as I understood it, while you were in Japan, or took whatever steps were necessary? A. Yes.

Q. While you were in Japan? And that application was made to whom in Japan?

A. I believe to the Home Ministry.

Q. And directing your attention to a paper on stationery, the heading of which is "Imperial Japanese Consulate General, [150] Honolulu, T. H.," on the side is a stamp number 528, December 2, 1941, reading:

"To Whom It May Concern:

"This is to certify that Kaname Fujino, according to the records of this office, was expatriated from the Japanese Nationality on January 19, 1939,

(Testimony of Kaname Fujino.)

by Notification No. 15 of the Ministry of Home Affairs.

“Consul-General of Japan,

“Per K. YUGE, Secretary.”

And having a gold biscuit on it (showing document to witness).

A. Maybe I could read it.

Q. Maybe you can read the imprint on the biscuit.

A. It says, “Imperial Japanese Majesty, Consulate General, Honolulu, T. H.”

Mr. Beebe: I'd like to offer this in evidence, if your Honor please. I have furnished a copy of it to Mr. Jansen.

Mr. Jansen: No objection.

The Court: Very well. It may become the Plaintiff's Exhibit—“J” is it?

The Clerk: Yes.

(Plaintiff's Exhibit “J” was received in evidence.)

[Plaintiff's Exhibit “J” set out on page 513.]

Q. (By Mr. Beebe): Now, at the time you left Japan, which as I recall was on April 26, 1941, what were your intentions? [151]

A. Oh, I wanted to come back to my native land. I wanted to go to an American college and I wanted to make this my home.

Q. Did you so express yourself to your father at the time of your leaving?

A. Yes, he wanted me to go to Waseda Univer-

(Testimony of Kaname Fujino.)

sity but I told him I wanted to come back to Hawaii and go to an American college.

Q. Now, at the time you left, or prior thereto, had your father said anything to you about the real property that he owned here in the Territory of Hawaii or the business that he had conducted here in the Territory of Hawaii?

A. Yes, he said he was——

Mr. Jansen (Interposing): Just a minute. I object to what he said. I think the answer to the question should be. Yes. I object to the witness going further, because if you are going to ask him for the conversation I am going to object to that.

Q. But your answer to the question is that you did have a conversation with your father in which the real property and the personal property was mentioned? A. Yes, casually.

Q. Was there any conversation with him regarding the incorporation of the business and a stock ownership in the business? Now just answer that Yes or No, please. A. Yes. [152]

Q. And approximately when did you have these conversations with your father, if you can tell us; if it is on more than one occasion, say so, giving us approximately the time?

A. I think just before the incorporation in about September, October, of 1940.

Q. Now, you knew Mr. Robert Murakami, do you? A. Yes, I do.

Q. Did you see Mr. Murakami while he was in Japan in the year 1940?

(Testimony of Kaname Fujino.)

A. Yes, I saw him.

Q. Where did you see him?

A. At my father's place.

Q. By that you mean at your home?

A. Yes.

Q. Did your father have a place of business also or just a home?

A. His home was his place of business.

Q. I see. On how many different occasions did you see Mr. Murakami at your home?

A. Well, I can't count how many times I saw him but on several occasions I saw him at our home.

Q. And how long, if you recall, was Mr. Murakami in Japan, if you recall?

A. Well, I saw him maybe about over a month.

Q. Did he live at your home or did he live elsewhere?

A. Yes, for a time I think he stayed, he stayed at my home; as a guest, he came and went.

Q. How long a time, would you say, that he stayed at your home?

A. Maybe a week. Well, it was quite far off.

Q. Now, in December of 1940, in December of 1940, December 12 of 1940, did you execute a power of attorney to Tokuichi Tsuda and Yasuo Tsutsumi?

A. Yes, I did.

Q. That power of attorney was executed on the 12th of December, 1940? A. Yes.

Q. And the signature there, Kaname Fujino, is that your signature (showing a document to the witness)? A. Yes.

(Testimony of Kaname Fujino.)

Q. What was the purpose of your executing that power of attorney, if you know?

A. I believe it was to sign a note to my father.

Q. This is a power of attorney executed by you to Tsutsumi and Tsuda? A. Yes.

Q. To execute a note? What did you say, for your father or by your father?

Mr. Jansen: To my father, he said. [154]

The Court: To.

Mr. Beebe: Oh, I see.

Q. What sort of a transaction was it that was contemplated when you say it was to sign a note to your father?

A. Well, about the time of the incorporation my father said he was giving us some shares, and he said I was still going to school and didn't show my worth yet, so, well, he was making us sign a note and later on he said he will give us, to us—now, I'm now still going to school yet, until a few years.

Q. This note was connected with the incorporation, did you say, and the shares?

A. Beg your pardon?

Q. This note was for what purpose, did you say?

A. What I recall, he just said he was making us sign a note for the shares.

Q. Shares in what?

A. That he was giving us, giving me——

Q. Again I say in what shares, shares in what?

A. In the corporation.

Q. And did you know that your father had incorporated his business into a corporation?

(Testimony of Kaname Fujino.)

A. Yes, he was saying that it has been incorporated.

Q. And that primarily, as I understand that power of attorney that you just mentioned, being Exhibit "I,"——

The Court: That's right.

Q. ——was given for that purpose, as you understood it? [155] A. Yes.

Q. Do you know whether or not such a note was executed by your attorneys-in-fact?

A. Well, I went to the American Consulate, signed it, and I was supposed to send it back to Mr. Tsuda and Tsutsumi.

Q. But my question was, do you know whether or not, as a matter of fact, your attorneys-in-fact, acting under the authority given in Exhibit "I" did execute a note to your father? A. Yes.

Q. Where is that note, if you know?

A. Now?

Q. Yes. A. I have a copy of it.

Q. Where is the original of that note, if you know?

A. Oh, it was in Honolulu at that time.

Mr. Jansen: The Custodian has it in the Custodian's Office.

Mr. Beebe: That's what I was trying to get from him, that the Custodian had the original of that note.

The Witness: Yes.

Q. The note was for how much?

A. Twenty thousand dollars.

(Testimony of Kaname Fujino.)

Q. And subsequent to your coming to the Territory of Hawaii—when did you arrive back here?

The Court: May. [156]

A. May 4, 1941.

Q. May 4, 1941? Were you shown or given a deed covering the property owned by your father?

The Court: "H."

Mr. Jansen: "H," isn't it?

The Court: That's the deed in question, "H."

Mr. Jansen: Yes.

Mr. Beebe: The deed being in evidence here as Plaintiff's Exhibit "H" (showing a document to the witness).

A. Yes, I saw this.

Q. From whom did you receive it?

A. From the Bishop Bank.

Q. Can you tell the Court the circumstances under which you received it from the Bishop Bank?

A. I remember once——

Q. I mean the first time.

A. ——Mr. Tsuda told me to go to the bank to pick it up and have it recorded, so I went to the Bishop Bank and got this, and that's when.

Q. Now, did you obtain the original of that deed, Exhibit "H," from the Bank of Bishop?

A. Yes, I got the original and brought it to the Bureau of Conveyances.

Q. Did you get anything else from the bank other than the original of that? [157]

A. This and another one, Land Court Certificate

(Testimony of Kaname Fujino.)

of Title. I brought it down to the Bureau of Conveyances.

Q. Then the original of that document which you are holding your hand, which is Exhibit "H," and the Transfer Certificate of Title, you took and had recorded yourself, is that correct?

A. Yes, yes.

Q. I noticed on the back of Exhibit "H" and on the left hand upper corner the name Kaname Fujino. Do you know in whose handwriting that name is? A. I must have signed it.

Q. Is that your signature? A. Yes.

Q. That is your signature, is it? A. Yes.

The Court: This matter of receiving this document from the bank is not clear to me, whether he means he received it from a bank official or from a safety deposit box in the bank or what.

Q. Will you clear that up?

A. I went to the note department of the bank and took it out and I signed for it and then I brought it there. And I must have—I brought it back to the bank because at that time it was under mortgage.

Q. When you say you brought it back to the bank, what [158] do you mean?

A. I signed it, I took it out. I registered it and I took it back after it was recorded and brought it back to the bank.

Q. Now, you still haven't answered my question. What do you mean by it? You took two things from the bank, the Transfer Certificate of Title—— A. And the deed.

(Testimony of Kaname Fujino.)

Q. —the deed, which is in evidence as Exhibit “H?” A. Yes.

Q. Now, what did you take back to the bank, both, or the Transfer Certificate of Title, or what?

A. Yes, the deed. The old one was under Yotaro Fujino, I think, and came back as Kaname Fujino. I have a copy of this title of certificate. That and this deed I brought it back to the bank and left it there.

Q. Well, now, was that the same day or some days or weeks later? A. Later on.

Q. Now, you mentioned the fact that the property was under mortgage to the bank. By that do you mean a mortgage of fifteen thousand dollars that is referred to in Exhibit “G,” directing your attention to Exhibit “G?”

A. Yes. Well, the details I wouldn’t know because Mr. Tsuda and Tsutsumi did the actual running of the business. I only knew that there was a mortgage. [159]

Q. Did you have occasion to endorse or sign a note at any time in connection with that obligation shown in the exhibit to which I have just called your attention? A. Yes.

Q. Have you that note, Kaname, in your files?

A. No.

(Mr. Beebe shows two small sheets of paper to Mr. Jansen.)

Q. Directing your attention to a canceled note in the amount of fifteen thousand dollars, bearing

(Testimony of Kaname Fujino.)

date March 13, 1941, payable to the Bishop National Bank of Hawaii at Honolulu, signed apparently by Yotaro and Chiyono Fujino, by Tsutsumi and Tsuda as their attorneys-in-fact, the same having on its face notations secured by mortgage dated March 13, 1941, and particularly addressing myself to the signature Kaname R. Fujino shown on the left-hand margin of that note, is that your signature, Kaname?

A. Yes.

Q. And when, Kaname, did you sign or endorse this note to which I have just addressed your attention?

A. When I said I went to the bank the first time to take out the deed and Transfer Certificate of Title. At that time they made me endorse this.

Q. At the time of that endorsement, do you know whether or not any funds had been turned over to Oahu Junk Company?

A. I don't know. [160]

Mr. Beebe: The reason I ask that question, I note on the back here the first endorsement apparently is June 20, 1941, and the principal is fifteen thousand dollars. I'd like to offer this note in evidence.

Mr. Jansen: No objection.

The Court: Very well. It may become the Plaintiff's Exhibit "K."

The Clerk: Exhibit "K."

The Court: Yes. "J" was the certificate of expatriation.

(Testimony of Kaname Fujino.)

(Plaintiff's Exhibit "K" was received in evidence.)

[Plaintiff's Exhibit "K" is a Photostat appearing at page 514.]

Q. (By Mr. Beebe): According to your recollection, then, that signature was placed on the note some time in May of 1941, would you say?

A. Yes.

Q. And was requested by the bank, did I understand you to say that? A. Yes.

Q. What official in the bank, if you know his name, did you deal with at that time, Kaname?

A. Most likely Mr. Gramberg.

Q. Mr. Gramberg, G-r-a-m-b-e-r-g, is that correct? A. Yes.

Q. I see.

A. I don't know whom I went to at that time but he is about the only one I know in there. [161]

Q. Now, what was done after execution or after you recorded that deed? I'll withdraw that. Oahu Junk Company, was that operating the business on the property, the subject matter of that deed?

A. Beg your pardon?

Q. Was the Oahu Junk Company doing business on the property conveyed to you by the deed that you have just seen? A. Yes.

Q. And after the deed was given to you and placed of record, did Oahu Junk Company pay you any rent or didn't it?

A. Yes, I received rental.

(Testimony of Kaname Fujino.)

Q. You received rental, did you?

A. From the Oahu Junk.

Q. How much per month?

A. Three hundred dollars.

Q. For how long a period of time?

A. Oh, until it was investigated, so until July '43.

Q. Until July of 1943? A. Yes.

Q. And what was done by you with the funds received from that rental?

A. Oh, I put it in my own check account.

Q. I see. Now, how do you consider that property? Do you consider it your own or do you consider it your father's or anybody else's? [162]

Mr. Jansen: That is objected to, if it please the Court. It is calling for a conclusion of the witness.

Mr. Beebe: I think perhaps counsel is correct.

Q. State whether or not you at any time had any agreement with your father or anybody else to the effect that you would hold this property for him until after the war was over?

A. No, I never had no agreement whatsoever to that effect.

Q. And the income from the property you took?

A. Yes, I used——

Q. Used it as your own, is that correct?

A. Yes.

Q. Do you know Mr. Tsutsumi and Mr. Tsuda?

A. Yes, I do.

Q. How long have you known them, Kaname?

A. Oh, since I was a small child.

(Testimony of Kaname Fujino.)

Q. Ever since you were a small child? Do you know where they were born? A. In Hawaii.

Q. Both of them? A. Yes.

Q. Do you know Mr. Yamamoto, did you know Mr. Yamamoto? Seichi, is that his name?

A. Seitaro.

Q. Seitaro Yamamoto. And how long have you known Mr. [163] Yamamoto?

A. Ever since I was a child.

Q. Is Mr. Yamamoto living or dead?

A. Dead.

Q. Do you know where he died or when he died?

A. He died in Hongkong.

Q. Hongkong, China? A. Yes.

Q. Approximately when?

A. I think it was in August 10th of 1941, about that time.

Q. Tell the Court the relationship, as you know it, that existed between Yamamoto and your father?

A. He was one of the oldest employees. He was my father's advisor and my father's confident.

Q. What's that?

A. He was my father's advisor and one of the oldest employees.

Q. Now, state whether or not your father wrote English? Did your father write English?

A. No.

Q. What could he write at all?

A. He wrote in Japanese.

Q. And do you know enough about Yamamoto, enough to know whether he wrote English? [164]

(Testimony of Kaname Fujino.)

A. No, I don't think. Maybe just sign his signature.

Q. Have you endeavored or have you gone through the files of the Oahu Junk Company or through any of the desks of any of the officers to ascertain whether or not there was any correspondence passing between your father and anybody here relative to the property, the subject matter of this suit?

A. Yes, I did.

Q. And have you been able to find anything pertaining to the transfer of this property to you?

A. Just the ones that you have, Mr. Beebe.

Q. Directing your attention to two—for want of a better expression I will say two letters, written in Japanese characters, one of them dated January 31, 1941, consisting of one, two, three, four, five pages, I will ask you if you have ever seen this letter and those pages, five in number? (Showing a document to the witness).

A. Yes.

Q. Where did you obtain or see that letter, Kaname?

A. Oh, I found it in Mr. Yamamoto's desk.

Q. Now, did Mr. Yamamoto have a desk at the Oahu Junk Company?

A. Yes, he had.

Q. And when you say Mr. Yamamoto you mean Mr. Seitaro Yamamoto?

A. Yes.

Q. And in whose handwriting is that letter or those five [165] pages?

A. It is in my father's handwriting.

Q. You say your father could write?

A. Yes.

Q. And you say that is your father's handwriting—correct?

A. Yes.

(Testimony of Kaname Fujino.)

Mr. Beebe: At this time, if your Honor please, I would like to offer this letter in evidence, and I might tell your Honor that photostatic copies of the letter have heretofore been furnished Mr. Jansen.

The Court: Does a translation accompany it? Do you have a translation accompanying it?

Mr. Beebe: I'll follow that with a translation.

Mr. Jansen: I have no objection to the original Japanese. I am not sure about the translation.

The Court: Just a moment. Are you going to produce the translation separately?

Mr. Beebe: Yes, I believe so.

The Court: Well, we'd better get this marked. The letter for which a translation is to be supplied may become Exhibit "K," or rather "L," Mr. Clerk.

The Clerk: "L."

(Plaintiff's Exhibit "L" was received in evidence.)

Mr. Beebe: January 16, 1941, is that?

The Court: Thirty-first. [166]

Mr. Jansen: I might say, if it please the Court, that we had translations of both of these letters; that one that is now in evidence and the other one, made by Professor Uyebara, who is in charge of the Japanese Language School at the University of Hawaii. If Counsel will let me compare his translations with the one that was prepared by the professor, maybe we can agree.

Mr. Beebe: That is all right. May we take a recess? This is a good time for a recess.

(Testimony of Kaname Fujino.)

The Court: Yes, with one slight correction on the record: We don't have a Japanese Language School at the University.

Mr. Jansen: I don't mean that. I mean he is a professor at the school.

(A short recess was taken at 2:30 p.m.)

After Recess

Mr. Beebe: If your Honor please, it is perhaps usual in cases of this kind where translations come in, for we seem to be farther apart after our conference than we were when your Honor was so kind as to take a recess. I have suggested to Mr. Jansen that we will go over our translations and his translations, if necessary obtain the services of some person whom we consider an expert, and see if we can get our translations together, or at least limit our questions to one or two other points.

The Court: All right.

Mr. Beebe: Mr. Jansen agreed to that. It doesn't seem, [167] if your Honor please, that we will progress any further this afternoon, and if your Honor has no objection I would suggest a recess, then, until two o'clock Monday.

The Court: On Monday, very well. You may save time by doing that. So I will do just that.

Mr. Beebe: I believe we will all save time.

The Court: All right. This case, then, stands adjourned until Monday at two o'clock, and the Court for the day.

(The Court adjourned at 3:15 o'clock, p.m.)

I, Albert Grain, Official Court Reporter, U. S. District Court, Honolulu, T. H., do hereby certify as follows:

That the foregoing is a true and correct transcript of proceedings in Civil No. 704, Kaname Fujino vs. Tom C. Clark, held in the above-named court before the Hon. J. Frank McLaughlin, Judge, on October 31, 1946; that same was transcribed by me from my stenographic notes of said case.

December 18, 1946.

/s/ ALBERT GRAIN. [169]

The within-entitled matter came duly on for further hearing on Wednesday, November 6th, 1946, at the hour of 9 o'clock a.m., all parties being present as before, whereupon the following further proceedings were had and done and testimony taken:

(R. N. Linn was duly sworn to act as court reporter in this cause, in the absence of the official reporter.)

The Court: Are you parties ready for further trial?

Mr. Beebe: Yes, your Honor.

Mr. Jansen: Yes.

The Court: I believe Mr. Fujino was on the stand when we last adjourned, and we had stumbled over a translation problem at that time.

Mr. Jansen: Yes.

Mr. Beebe: If your Honor please, at the close of the last session we were referring to Exhibit

"L," and either myself or your Honor made a statement in the record to the effect that the letter was dated as of January 31, of the year 1941. Factually, and I think Mr. Jansen will agree, the letter was dated January 16th 1941, and the stamp-mark on it of January 31, 1941, is the date of its receipt here in Honolulu.

The Court: So the correct date of its writing is January 16, 1941, and the date of the receipt is January 31, 1941?

Mr. Beebe: Yes.

The Court: All right. [170]

Mr. Beebe: During the recess, if your Honor please, we agreed to a translation of this letter of January 16th, 1941, which is Exhibit "L." If your Honor cares to have me do so I can read it, and offer the translation, or I will offer the translation in evidence, and ask that it be given an appropriate letter.

The Court: I think it should be marked as part of Exhibit "L."

Mr. Beebe: All right, your Honor.

The Court: Do you think it would be helpful if you read it, also, so that we all know what it contained.

Mr. Beebe: I believe so, if your Honor please.

Clerk: Exhibit L-1.

(Document offered is received and marked:
"Petitioner's Exhibit L-1.")

[Petitioner's Exhibit L-1 set out on pages
515 to 517.]

Mr. Beebe: I will read it, beginning at the upper lefthand corner.

(Mr. Beebe starts reading Exhibit L-1.)

The Court: Do you want the reporter to take it down as you read it, too?

Mr. Beebe: I don't think so.

(Mr. Beebe reads document.)

Mr. Beebe: He made a mistake here. (Shows to Mr. Jansen).

The Court: Is it particularly pertinent?

Mr. Beebe: I don't think it is pertinent at all, if your Honor please. [171]

We are primarily concerned with the post-script.

The Court: Yes. Very well.

KANAME FUJINO

the plaintiff herein, resumed the stand for further examination and testified as follows:

Direct Examination

(Continued)

By Mr. Beebe:

Q. Now, as I recall, at the last hearing, Kaname, your attention was directed to a letter of February 20, 1941, and this letter being signed by "Takeo Fujino"? A. Yes.

Q. And what relationship is there between yourself, your father and Takeo Fujino?

A. Takeo Fujino was my cousin.

Q. And Takeo lived where?

A. With my father.

(Testimony of Kaname Fujino.)

Q. And do you know Takeo's handwriting?

A. Yes, I do.

Q. Directing your attention to a letter written in Japanese characters, having at its upper left-hand margin some Japanese characters, followed by, I think, the numeral "16" and then followed by another Japanese character and the numeral "2," followed by another Japanese character with the numeral "20," I will ask you in whose handwriting that letter is.

A. This is in the handwriting of my cousin, Takeo. [172]

Q. Now, have you seen Takeo write, and seen correspondence from Takeo? A. Yes.

Q. And you therefore know that that is in his handwriting, do you?

A. Yes, it is his handwriting.

The Court: The translation is agreed upon?

Mr. Jansen: Yes, your Honor.

Mr. Beebe: Yes, the translation is agreed upon, if your Honor please, so I will offer the Japanese letter and the translation and ask that it be marked for identification.

The Court: It may be marked for identification. Mark it "M" for identification, and "M-1" for identification, for the translation, and then if it comes in we can just cut off the identification symbol.

(Documents offered in evidence are received and marked: "Plaintiff's Exhibits M and M-1 for identification," respectively.)

(Testimony of Kaname Fujino.)

Mr. Beebe: At this time I will offer it in evidence, if your Honor please, just to see what the United States Attorney is going to do about it.

Mr. Jansen: Oh, I have no objection.

The Court: All right. Take off from M and M-1 the words "for identification."

(Documents marked: Plaintiff's Exhibits "M" and "M-1" respectively.) [173]

[Plaintiff's Exhibit M-1 set out on page 518.]

Mr. Jansen: Except, I want to point out to the Court, that it is true with this exhibit, as well as with Exhibit L, that the matter in brackets is excepted—it is not a part of the literal translation, rather. In "L" there are two or three matters in brackets, in the translation. In "M-1" there are three items in brackets and those items are supplied.

The Court: Well, with regard to the Exhibit "L," and now "M," are these matters in brackets controversial?

Mr. Beebe: No, I think we have agreed on them. We have anticipated calling the Court's attention to the supplied portions, and to that portion which was a literal translation of the quoted telegram.

The Court: All right.

Mr. Beebe: At this time, if your Honor please, I will read the February 20th translation—Exhibit "M," leaving off the upper left-hand corner. It is dated February 20, 1941.

(Testimony of Kaname Fujino.)

(Mr. Beebe reads as indicated.)

Mr. Beebe: As I understand it, if your Honor please, the words or word "tube"—appearing in brackets, after "black"—

Mr. Jansen: There is no controversy about that.

Mr. Beebe: That has been added. And then that a literal translation of the last sentence of the quoted telegram is: "Unless you send, it is not possible to change land to Master Kaname," and there has been added the language in brackets: "the ownership or title of" and that would be after "change," [174] and then there is an "it," prior to the "it" in that paragraph, that has been added, after the word "send."

The Court: Do I understand from that letter the person who wrote it in Japan had received a radiogram which he is quoting in that letter?

Mr. Beebe: Yes, your Honor.

The Court: And signed by this cousin? Is it signed by the cousin "for"?

Mr. Beebe: "Written by" I think is the exact language.

The Court: Is there anything to indicate that it is written for Yutaro Fujino?

Mr. Jansen: From his printed stationery, I think.

The Court: It appears from the heading that it would be his stationery, but the man might have borrowed a piece of paper.

Q. Now you heard the question propounded by the Court, did you not, Kaname? A. Yes.

(Testimony of Kaname Fujino.)

Q. Can you answer that question propounded by the Court?

A. Yes, Takeo was my father's secretary. He wrote some of these letters. Of course my father looked through. And "daihitsu" in Japanese characters, that means "written for" Yotaro Fujino.

Q. (By the Court): It means what; secretary to the father?

A. "Daihitsu" means "write for." [175]

Q. (By Mr. Beebe): "Write for"?

A. Yes.

Q. Specifically, then, there is no signature of your father on this Exhibit M-1? A. No.

Q. And is there any reference to your father?

A. Yes; this is his stationery.

Q. That is, the hieroglyphics, the Japanese hieroglyphics, on the right-hand margin of this letter, are your father's name, is that correct?

A. Yes.

Q. I notice that in the 9th or 10th column there is a pencil mark alongside of the Japanese hieroglyphics. What is that hieroglyphic?

A. That is "kirikae"—(spelling) "k-i-r-i-k-a-e."

Q. And "kirikae" means what in English?

A. To change or transfer.

Mr. Jansen: I thought we had agreed on that.

Mr. Beebe: That's right.

Mr. Jansen: I thought we had agreed on "change." And we have agreed on the material that has been supplied by us; that is, both sides?

Mr. Beebe: That's right.

(Testimony of Kaname Fujino.)

Mr. Jansen: But the other, without the brackets, is the written translation of the cable that was sent.

Mr. Beebe: Yes, "kirikae" we have agreed is "change" and then we have interpolated "the ownership or title of."

Q. Now, at the time this transfer was made to you, the transfér as indicated by the deed in evidence, did you make any return of any kind to any Federal body or organization? A. Yes.

Q. Directing your attention to two forms in green, the first having stamped on it "Client's copy" and having at its heading in the middle, "United States gift tax return, Calendar year 1941; donor, Yotaro Fujino," and the second, "Gift tax, donee, or trustee's information; return of gift," and then donor's name, Yotaro Fujino, and donee's name, "Kaname Fujino, 1217 North King street," are these copies of the original returns made at the time of the transfer of the land involved, to you?

A. Yes.

Q. And the check attached, to Collector of Internal Revenue, which is on the Bishop National Bank of Hawaii, dated January 16, 1942, being for the amount of 779.63, do you know whether or not that check was paid out at the time these returns were made? A. Yes.

Mr. Jansen: No objection.

Mr. Beebe: I will offer the check, together with the two returns, in evidence, if your Honor please. May I ask that they [177] be appropriately marked.

(Testimony of Kaname Fujino.)

The Court: They may be marked. I think you had better call the green paper Exhibit "N" and the check itself "N-1".

(Documents offered in evidence are received and marked: Plaintiff's Exhibits "N" and "N-1," respectively.)

[Plaintiff's Exhibits N and N-1 are Photo-stats appearing at Pages 519 to 524.]

Q. Now, Kaname, at any time, either prior to or after the deed to you, which is Exhibit H in evidence, did you have any agreement or understanding with anyone that you would later return the property covered by that deed to your father or to anyone else? A. No.

Mr. Beebe: I think that is all, if the Court please.

The Court: Cross-examination.

Cross-Examination

By Mr. Jansen:

Q. Now, Kaname, Mr. Beebe asked you if at the time you received the transfer of this land you made a gift tax return, and you answered "yes." Is that correct? A. Yes.

Q. Now, you did not make this gift tax return at the time you received the deed, did you?

A. No.

Q. It was a year later, was it not, in 1942?

A. I found out after I came back that I had the

(Testimony of Kaname Fujino.)

records, [178] that our accountant, Tenment & Greaney, had filed them for me.

Q. What was that?

A. After I came back I found out that the gift tax had been filed for me.

Q. After you came back you found out this gift tax had been filed for you? A. Yes.

Q. You came back in 1941, in May, didn't you?

A. Yes.

Q. And the gift tax was not filed until March 1942, was it? A. A year later.

Q. In fact, it was paid by check dated March 16, 1942? A. Yes.

Q. And the return shows the date here, at the place where the oath is to be filled in, of March, 1942? A. Yes.

Q. And it was in March, 1942, that this form, Exhibit N, and the check for the gift tax, were filed—or were filled out and were turned in, wasn't it? A. Yes.

Q. That was about nine months after you got back from Japan, wasn't it? A. Yes.

Q. Now you did not pay the tax on this, this gift tax, did [179] you? A. No.

Q. You paid it out of your father's funds?

A. Yes.

The Court: Under the Federal law from whom is the tax due, the giver or the receiver, Mr. Jansen?

Mr. Jansen: Frankly, your Honor, I am not sure.

(Testimony of Kaname Fujino.)

The Court: I haven't looked it up either, but I would presume it would be the donor.

Q. Now, Kaname, when you were fourteen years old you went to Japan? A. Fifteen.

Q. Fifteen? A. Yes.

Q. You were actually 21 years old on February 23, 1940—is that the date? A. Yes.

Q. And you went to Japan in 1934?

A. Yes.

Q. So you were fifteen? A. Yes.

Q. That is, six years earlier? A. Yes.

Q. And you stayed in Japan from the time you were fifteen years of age until you were a little over twenty-two years of age? [180] A. Yes.

Q. And during all of that time you went to school in Japan? A. Yes.

Q. And what was the name of that school?

A. Waseda Business School.

Q. Waseda Business School? A. Yes.

A. And at the business school I presume you learned to keep books? A. Yes.

Q. You learned typewriting? A. Yes.

Q. Shortland, or anything like that; the usual business course? A. Yes.

Q. And of course you learned the Japanese language; that is, the writing of it in more detail than you had known before? A. Yes.

Q. And when you were twenty-two, in the early part of 1941, your father wanted you to stay in Japan and go to the Waseda University?

A. Yes.

(Testimony of Kaname Fujino.)

Q. And you wanted to come to the United States, to Hawaii [181] or to the mainland, and go to school here? A. Yes.

Q. That is what you testified? A. Yes.

Q. If you had gone to Waseda University how long would you have continued in school?

A. Another six years.

Q. Another six years? A. Yes.

Q. And coming here to Hawaii, or to the mainland, if you had gone to school, how long would you have continued in school? A. Four years?

Q. Four years? A. Yes.

Q. So it was your plan when you left Japan to come to Hawaii and continue in school for at least four years? A. Yes.

Q. And I believe after that time, after the four-year period was out, you had intended to join your father in his business.

A. I intended to run the Oahu Junk Company.

Q. After the four-year's course of school?

A. Yes.

Q. Did you and your father have any misunderstanding [182] about your going to the Waseda University or coming here to school?

A. No, he just left it up to me.

Q. He left it up to you? A. Yes.

Q. And he wanted you to go there, and you wanted to go here? A. Yes.

Q. Now when you were in Japan and attending the Waseda Business School were you living at your father's home? A. Yes.

(Testimony of Kaname Fujino.)

Q. Were you doing any work at all?

A. No, I just studied.

Q. Did your father have any other place of business than his home? A. No.

Q. In Japan? A. No.

Q. He continued his business with the Oahu Junk Company from his home in Japan?

A. Yes.

Q. Did you ever handle any of his correspondence with the Oahu Junk Company? A. No.

Q. Your cousin, Patao, was your father's secretary? [183] A. Yes, he wrote letters.

Q. Did your father have any other employees in Japan?

A. Yes, I think he had some other people writing letters for him.

Q. Writing letters? A. Yes.

Q. Aside from actually writing letters, did he have any other employees; people doing anything else besides handling his correspondence?

A. No, I don't think so.

Q. And when you were attending school at Waseda Business School did you come home every night; sleep at home every night? A. Yes.

Q. Did you eat all of your meals at home?

A. Yes, unless I go to my friends place.

Q. Oh, yes. And did you have occasion to observe what correspondence there was between your father and the Oahu Junk Company here in Hawaii?

(Testimony of Kaname Fujino.)

A. Well, I just saw the envelopes, and the letters come in, but I never did help him write correspondence, because he just told me to do my own studying. He didn't care for me to help him out.

Q. Did he have any books of account or anything like that in Japan, in his home? [184]

A. I think so.

Q. Did you ever have anything to do with working on these books of account? A. No.

Q. Did he have any other items, ledgers, or any other books, in connection with his business of the Oahu Junk Company in Japan, that you know of?

A. I did not get to look at them close.

Q. Then, if I understand you correctly, you went to school and attended to your studies, and had absolutely nothing to do with your father's business? A. Yes.

Q. He never told you what he had or what he was doing; what he was buying, or what he was selling?

A. Well, just generally, I used to——

Q. You knew that he was in business?

A. Yes.

Q. But he never discussed any of the details of the business with you? A. No.

Q. He never discussed any of the books, the accounts receivable or the accounts payable; any of the correspondence; any of the shipments; any of the items or details of the business of the Oahu Junk Company with you? A. No.

(Testimony of Kaname Fujino.)

Q. Is that correct? [185] A. Yes.

Q. So when you left for the mainland you were absolutely ignorant of any of the details or affairs of the Oahu Junk Company?

A. Yes; just generally.

The Court: You used the word "mainland" there——

Mr. Jansen: I mean, the mainland of the United States.

Q. I mean, when you left for the United States?

A. Yes.

Q. That is,—for Hawaii. A. Yes.

Q. You were absolutely ignorant then of any details of the business of the Oahu Junk Company?

A. Yes.

Q. You knew that you had had 200 shares of stock issued to you,—or did you know that?

A. Yes, I recall his saying that to me.

Q. You recall that? A. Yes.

Q. Did you talk much about it with your father?

A. Oh, not to go into the details.

Q. He just said to you: "I have issued 200 shares of stock to you?" A. Yes.

Q. And I believe you testified the other day he said: [186] "You have not proven yourself yet, so I am going to have you give me a note for twenty thousand dollars for that stock?"

A. Yes.

Q. Is that right? A. Yes.

Q. Did he say anything more about that stock?

A. No, that is about all.

(Testimony of Kaname Fujino.)

Q. He just announced that to you; he said "I have issued 200 shares of stock. You haven't proven yourself, and so you have got to pay me under this note twenty thousand dollars," or you gave him a note for twenty thousand dollars for the stock?

A. Yes; he knew I was going to school; he told me I was to study hard.

Q. And that was the reason you had sent this power-of-attorney in December to Tsuda and Tsutsumi, so that they could execute this note for twenty thousand dollars?

A. Yes.

Q. Did you have any other reason for sending that power-of-attorney?

A. I don't know.

Q. You don't know. Well, you and your mother executed powers-of-attorney at the same time, in December, 1940, didn't you?

A. Yes, about the same time. [187]

Q. Do you know who prepared those powers?

A. No.

Q. You don't know anything about that?

A. Yes.

Q. When did you first see the power-of-attorney that you signed?

A. I believe it was in December.

Q. Who showed it to you, your father?

A. I think so.

Q. He showed you this power and said "I have got this power from Hawaii, and I want you to sign it," is that what you did?

(Testimony of Kaname Fujino.)

A. Well, he told me to go to the American Consulate to have it signed there.

Q. But before he showed it to you you had never seen it before? A. Yes.

Q. Well, when you say "yes" you mean "no"; you meant that you had not seen it before, before your father showed it to you? A. Yes.

The Court: I think we better go over it again.

Q. Had you seen the power-of-attorney before your father showed it to you and asked you to go to the Consulate? A. No. [188]

Q. Did your father say anything about the power except "Take it; go to the American Consul and have it verified" or acknowledged, or whatever he instructed you to do? A. No.

Q. He said nothing else? A. No.

Q. When did he first tell you,—or when did you first learn that the power was sent so that the attorneys in fact, Tsuda and Tsutsumi, could execute a note for you? When did you first learn that?

A. When I first found out that I am to sign it?

Q. When did you first find out that you were to sign the power-of-attorney?

A. When I saw it. I knew my father was saying he was going to incorporate the business.

Q. You had learned that?

A. He was giving me some shares.

Q. He had mentioned it before?

A. About that time.

Q. That he wanted you to sign a note for twenty thousand? A. Yes.

(Testimony of Kaname Fujino.)

Q. And that is why you were to send this power-of-attorney? A. Yes.

Q. And he told you what to do? [189]

A. He told me to go to the American Consulate.

Q. I mean, he said "I am incorporating"; that is one thing he said? A. Yes.

Q. And he said "I am going to issue some shares of stock to you, Kaname"; that is another thing he said, and he said "You will have to give me a note back for twenty thousand dollars"; that is another thing he said, or this power-of-attorney, so that you can give me a note back for twenty thousand? A. Yes.

Q. Now you were to go to the American Consulate and get it fixed up? A. Yes; I did.

Q. Did he say anything else, or explain anything else about the details of the incorporation, or the notes, or any of the transactions, at that time?

A. The only thing I recall was——

The Court: Speak a bit louder, please.

A. He said eventually he will give me,—give it all to me.

Q. Some day? A. Yes.

Q. Some day he will give it all to you?

A. Yes, but since I was going to school, and I did not show my merits yet, so he told me to study hard and when I [190] come back, after I go to school, help in that store.

Q. Some day, after years of time, and you prove—— A. Maybe in a year or so.

(Testimony of Kaname Fujino.)

Q. Maybe he will give it to you?

A. I can show I can run his business, he wanted to give it to me.

Q. I see. Are you the eldest of your family, your father's children? A. No.

Q. You were 22 in 1941, in February?

A. Yes.

Q. You have two sisters? A. Yes.

Q. And did your father and mother have any other children living now? A. No.

Q. So, in the family, the children of your father and mother, are you and your two sisters?

A. Yes.

Q. And how old are your sisters?

A. Now?

Q. Well, yes; now? A. About 33 and 32.

Q. About 33 and 32? A. About that. [191]

Q. Four or five years older than you?

A. Yes.

Q. So, in 1941, when you were 22, your sisters were four or five years older; 26 or 27?

A. Yes, about that age.

Q. They are about a year apart? A. Yes.

Q. Did your father tell you why he was taking notes from your sisters for the stock?

A. No, I don't know about them.

Q. Your sisters were married then, were they not? A. 1940? Yes.

Q. One of them had a baby?

A. In February, yes.

(Testimony of Kaname Fujino.)

Q. And the other one was married, too?

A. I think just about married at that time.

Q. They were both over 21, is that correct?

A. Yes.

Q. And they were not going to school. Were their husbands working, do you know?

A. Yes.

Q. Did their husbands work for the Oahu Junk Company? A. Yes.

Q. They did? A. Yes. [192]

Q. And your father never mentioned anything about why he was taking notes back from your sisters?

A. I don't recall. He may have told me.

Q. In fact, your father really never discussed the business of the Oahu Junk Company with you, except to tell you what to do about this power-of-attorney and about the stock and the notes; that is correct, isn't it? A. Beg pardon?

Q. Well, let me start over again. Your father never discussed the business of the Oahu Junk Company with you? A. Not in detail.

Q. No. Did you hear the testimony of Mr. Muri-kami? A. Yes, I did.

Q. In court. He said that your father told him in July of 1940 that he was going to take notes back from your sisters and from you so that he would have some measure of control over the stock. Do you understand that to be correct? A. Yes.

(Testimony of Kaname Fujino.)

Q. Now, Kaname, when you came back to Hawaii in May, 1941, you fully intended to go to school for a period of around four years?

A. Yes.

Q. And when you got to Hawaii in May, 1941, you learned that there was a deed here made out to you, is that correct?

A. Yes. [193]

Q. Before you got to Hawaii in May, 1941, did you know that that deed was here for you?

A. Well, I knew my father told me he was giving me the real property, the land.

Q. And when was that?

A. Oh, just before the incorporation.

Q. At the same time as he talked to you about the stock?

A. Yes.

Q. When he told you that you had not proved yourself yet and so he wanted notes back for the stock?

A. Yes, he said the business was being incorporated, but the land he was giving it to me.

Q. He told you that?

A. Yes.

Q. Now, you answered Mr. Beebe's question the other day, last Thursday. He said to you: "Was there any agreement with your father that you would turn this land back after the war?" and you answered "Not to that effect." Do you remember that?

A. No.

Q. Don't you remember answering like that?

A. I think, I recall, just I had no such agreement.

(Testimony of Kaname Fujino.)

Q. No agreement to that effect? A. Yes.

Q. What was the agreement?

A. We had no agreement. [194]

Q. Had no agreement. Now when you came back to Hawaii in May, 1941, did you start working for the Oahu Junk Company? A. Yes, I did.

Q. How soon after you came back?

A. Well, I was there.

Q. How soon was it, a month or two months?

A. Well, every day I was in there.

Q. You came back in May? A. Yes.

Q. Did you go to the Oahu Junk and start working right away?

A. My vacation. After about a week or two week's vacation.

Q. What kind of work did you do at Oahu Junk Company when you first started working?

A. I still did not know the business, so I just helped waiting on customers, and——

Q. Things like that?

A. Yes, some; simple.

Q. The business, you said last Thursday, was being run by Tsuda and Tsutsumi? A. Yes.

Q. They handled the entire business?

A. Yes. They are the manager and assistant manager.

Q. And they were in charge of all of the details and the [195] affairs of the business? A. Yes.

Q. They supervised the keeping of the books; the buying and selling? A. Yes.

(Testimony of Kaname Fujino.)

Q. You had nothing to do with the management of the business at all? A. No.

Q. You left that entirely to Tsuda and Tsutsumi? A. Yes.

Q. Now you testified, Kaname, last Thursday, that you got rent for this land from the Oahu Junk Company? A. Yes.

Q. When did you start drawing that rent?

A. As soon as I came back.

Q. As a matter of fact, Kaname, you did not get any rent until in September, 1941, did you?

A. Well, I was receiving some rent already.

Q. Do you know, as a matter of fact, that in the last part of August,—on August 22, 1941, you received your first check for rent?

A. Yes, I think—I don't know for how many months it accrued, yes.

Q. But up to that time no rent had been paid you?

A. I got mixed up. I used to collect through "Camp" rentals, [196] too.

Q. That is some rentals of your mother's property, is that what you mean? A. Yes.

Q. Now, Mr. Tsuda and Mr. Tsutsumi fixed the amount of rent to be paid by the Oahu Junk Company at three hundred dollars a month, didn't they?

A. Yes.

Q. You had nothing to do with fixing the actual rent that was to be paid, did you? A. No.

(Testimony of Kaname Fujino.)

Q. And the first check that was paid for rent was paid in August, 1941, after Tsuda and Tsutsumi told you what they would pay, is that correct? A. Yes.

Q. You put the rent, the three hundred dollars a month that Tsuda and Tsutsumi said they would pay you for rent, into your own checking account?

A. Yes.

Q. And what did you do with it after you put it in the checking account?

A. I paid the expenses; repair and water bill, and I was going to college, and I use it for my own expenses and spending money; my college expenses.

Q. What college were you going to? [197]

A. University of Hawaii.

Q. How long did you go there?

A. I went about a year and one-half.

Q. Your mother had told you to collect the rent from her property for your college expenses, didn't she? A. Yes. I put it all in one.

Q. All in one?

A. That is what I mean; all in one.

Q. And most of that money, the three hundred dollars a month, you used to make repairs, pay taxes—— A. Pay taxes.

Q. Did you pay the taxes?

A. For the Oahu Junk Company property, no.

Q. You did not pay the real property taxes? Didn't you pay the taxes in 1942? Or, 1943?

A. At the Camp I did.

Q. And the "Camp"; you mean that is your mother's property? A. Yes.

(Testimony of Kaname Fujino.)

Q. But on the real property that the Oahu Junk Company was on?

A. On that one the corporation was supposed to pay the rent, water bill and electric bill, and if there were repairs, and insurance.

Q. You say the corporation was to pay the rent, the water bill and electric bill, repairs and insurance? [198]

A. Yes.

Q. And you told us a minute ago that you had paid the water bill, repairs and so on, amounting to three hundred dollars.

A. I threw it all in one thing, together. That is the Camp, and I had another property that I used to collect a little; used to pay those, but the corporation used to pay their own.

Q. You mean the corporation paid the water bills?

A. Yes.

Q. And the electric bill and repairs, and the taxes.

A. Yes.

Q. And all of the upkeep of the real property?

A. Yes, that the corporation was using.

Q. How about the real property that the corporation was not using? Did they pay that, too?

A. No.

Q. Are you familiar with the location of these pieces of real estate?

A. Yes.

Q. Well, how about this piece Number 6; how about the taxes on that?

A. That I did, because I collected the rental.

Q. Well, what kind of property is that?

A. That is rental property. [199]

Q. Is there a house on it?

A. Yes.

(Testimony of Kaname Fujino.)

Q. And who lives there? A. Mr. Kohama.

Q. Mr. Kohama? A. Yes.

Q. And you say you paid the taxes on that piece of real property? A. Yes.

Q. Are you sure of that? A. Yes.

Q. And how did you pay them?

A. From the rental income.

Q. From the rental income? A. Yes.

Q. How about this piece of property, parcel number 5?

A. Oh, these the corporation paid.

Q. Well, did the corporation use parcel number 5? A. Yes, the corporation used.

Q. I understood this parcel was being rented to some contractor? A. Yes, that is just rental.

Q. Oh, I see. And in 1941, and 1942, and 1943, the corporation used it? A. Yes. [200]

Q. And they paid the taxes, you say, on parcels 1, 2, 3, 4 and 5? A. Yes.

Q. And you paid the taxes on parcel number 6? A. Yes.

Mr. Beebe: For the purpose of the record, might the record show that in these references, counsel is referring to Defendant's Exhibits 1, 2 and 3.

Mr. Jansen: Oh, yes, certainly. The parcels are identified in Defendant's Exhibits 1, 2 and 3, and I have been showing you these three exhibits in discussing these various parcels with you, Kaname.

A. Yes.

Q. Correct? A. Yes.

Q. Did you have a written lease between you and the Oahu Junk Company? A. No.

(Testimony of Kaname Fujino.)

Q. You mean it was an oral understanding?

A. Yes.

Q. Well, did Tsuda and Tsutsumi tell you "We will pay you \$300 a month and pay the taxes and repairs and upkeep"? A. Yes.

Q. And you did not bargain about that at all; you said "That is all right"? [201] A. Yes.

Q. Now, Kaname, the Oahu Junk Company could not do this business unless they had this real estate, could they? A. I think so.

Q. You think they could? You mean, you think they could not do business without real estate?

A. Yes.

Q. Let me ask you a question, just to be sure. Could the Oahu Junk Company do business if they did not have this real estate?

A. Well, I don't have that much business mind, to be definite.

Q. Well, you are a director of the corporation now, aren't you? A. Yes, I am.

Q. And you have been connected with the business since 1941? A. Yes.

Q. But you are not able to say?

A. Well, it would put a hardship on the corporation if they didn't have the land.

Q. It would be a great hardship to the corporation if they didn't have the land? A. Yes.

Q. Now besides paying for your own schooling out of the [202] rent you gave money to your sisters, did you not?

A. Yes; looked after them.

(Testimony of Kaname Fujino.)

Q. You also took care of obligations of your mother and father? A. Yes.

Q. For example, you gave five hundred dollars to one of either Tsuda or Tsutsumi when he was married, out of this money? A. Yes.

Q. That was a gift not from you, but from your father and mother?

A. Yes, a family gift.

Q. A family gift. So out of the rent that you collected on this real estate you took care of your own expenses, and supplied money to your two sisters, and took care of obligations of your mother and father as they arose? A. Yes.

Q. And that you had understood with your father, when he gave you this land in 1941, that you were supposed to do that with it, is that correct? Did you understand that that is why you were being given the land, to take care of all these things, these expenses that would come up, and so on?

A. I don't know what you mean by that.

Q. When your father told you he was giving you this land, he also told you that you would have to pay for your schooling? [203] A. Yes.

Q. Help your sisters? A. Yes.

Q. Take care of his obligations? A. Yes.

Q. Take care of your mother's obligations?

A. Yes.

Q. All these things you said you have done, he told you you would have to do out of the land, is that correct? A. Yes.

(Testimony of Kaname Fujino.)

Q. In other words, what you rfather wanted you to do was to take his place here in Hawaii as if he were here doing it himself, since he was unable to be here; he wanted you to take his place and take this land?

A. Yes; he wanted me to be independent, too, to work here, and run the store.

Q. And the store, taking his place here?

A. Yes, he was getting old, and he was getting retired.

Q. And he wanted you to take his place here in Hawaii? A. Yes.

Q. Did he write to you from time to time after you left Japan? A. Yes, he wrote.

Q. Did you write back to him? A. Yes.

Q. Did he tell you about little things to do here and there; about this wedding present to give to this attorney-in-fact, and so on?

A. Yes, I wrote to him he was getting married, our friend, and I let him know our news.

Q. He wrote back and said "Give them \$500"?

A. Yes.

Q. And you wrote to him about different other details with regard to the land, and he wrote back and told you what to do, is that right?

A. Well, mostly it was about our family affairs.

Q. Mostly it was about the family and the obligations of the family, is that correct? By "obligations" I mean the things that come up?

A. Yes.

(Testimony of Kaname Fujino.)

Q. You were in school, your sisters were married, they needed money, and you paid out money for this wedding gift, and paid out money for other things, and all these things you discussed with your father in your letters, back and forth? A. Yes.

Q. And he advised you, and instructed you what to do? A. Yes.

Q. And it was pursuant to his instructions: it was following his instructions, for example, that you gave the \$500, as a wedding gift to the attorney-in-fact—to that attorney-in-fact? [205] Which one was it? A. The youngest brother.

Q. Who?

A. Yes, it was the youngest brother of Mr. Tsutsumi.

Q. The youngest brother of Tsutsumi?

A. Yes.

Q. And it was your father's instruction that you give him this \$500 for a wedding gift?

A. Yes.

Q. Out of this money that you were accumulating from this rent? A. Yes, that's true.

Q. Do you remember any other items that your father instructed you about in connection with the money that you had in this bank account?

A. No.

Q. Were there other items?

A. No; I don't know.

Q. You do not remember particularly other items, but you wrote back and forth regularly to your father, did you not?

(Testimony of Kaname Fujino.)

A. Yes, every now and then.

Q. Every now and then. When, in 1941, you received this deed, your father was 55, is that right?

A. Yes, about that.

Q. He was living in Japan? [206] A. Yes.

Q. How old was your mother?

A. About fifty; five years younger.

Q. Fifty? A. Yes.

Q. Your mother had given deeds to her land some four or five years before, to you, had she not?

A. Yes.

Q. But she kept to herself a life estate, didn't she? A. Yes.

Q. You know what I am talking about, don't you? A. Yes.

Q. Then when you came to this country she said "You go ahead and collect the rents and handle it all together; you take care of the family affairs over in Hawaii?" A. Yes.

Q. So when you came here you had these instructions from both your father and your mother to that effect?

A. Well, at that time I didn't know about the life estate.

Q. You didn't know about what?

A. The life estate.

Q. You didn't know about the life estate?

A. Yes.

Q. When did you find out about that?

A. When the Alien Property Custodian told me to make a [207] report on it.

(Testimony of Kaname Fujino.)

Q. You mean you did not know? A. Yes.

Q. Who had collected the rent while you were living in Japan? A. Oh, the attorneys-in-fact.

Q. But when you got over to this country you told them you would collect the rent from now on?

A. Yes.

Q. Yamamoto, is that the old man's name, who died? A. Yes.

Q. Was he here in this country when you came in May, 1941? A. No.

Q. Where was he then? A. In the Orient.

Q. In the Orient. Do you know when he had left for the Orient?

A. I didn't know the exact date, but I remember seeing him just before I left there.

Q. Seeing him in the Orient? A. Yes.

Q. He died in the Orient, did he? A. Yes.

Q. And the correspondence you saw that was carried on before you came back to Hawaii was mostly between Yamamomto and [208] your father?

A. Yes.

Q. How did you know that?

A. Well, at least I could tell it was Yamamoto. The letters came in. I knew that was not Tsuda's writing, on the envelope, address.

Q. Did Yamamoto die while you were still in Japan? A. No, while I was here.

Q. After you had come back? A. Yes.

(Testimony of Kaname Fujino.)

Q. Well, who corresponded with your father after you got here, between the Oahu Junk Company and your father?

A. I don't think—I don't know, after Yama-moto went there, they went to Shanghai and the Philippines, so we did not get a chance to write to them much?

Q. Well, later on?

A. They sent from their side, though.

Q. What is that?

A. They sent a letter from their side.

Q. Of course after December, 1941, there are no letters at all passing back and forth, is that correct?

A. Yes.

Q. But between the deed, in May, 1941, and December, 1941, you had written to your father and had heard back from your father? [209]

A. Yes.

Q. Once or twice, maybe, or even more than that?

A. Yes.

Q. And among other things he told you to give this \$500 to Tsutsumi's brother as wedding present?

A. Yes.

Q. And you did? A. Yes.

Q. Now were you the one, Kaname, that looked for the correspondence the other day, before this case started?

A. Yes.

Q. And you found two letters that have been received in evidence, Exhibits L and M?

A. Yes.

Q. In the other testimony? A. Yes.

(Testimony of Kaname Fujino.)

Q. Now, with Exhibit "M," there were two or three more pages when I first saw it. Were they all together when ou found it?

A. I just found them in a bunch, or folder.

Q. And you found "L," and that is the one that is written by your father personally? A. Yes.

Q. That is his handwriting? A. Yes. [210]

Q. And you found "M"? A. Yes.

Q. Now, the the first time I saw "M," this one (indicating), it was attached to these other pages that I am showing you now? A. Yes.

Q. Dated the 19th, is that right? A. Yes.

Q. Is that the way it was in the folder, all of them together?

A. I am not sure now. Anyway, a bunch of letters; I just went through and that is all I found pertaining to the land.

Q. I see.

A. It must have been together.

Q. In any event, you brought L and M to your counsel and then also these pages which I have just shown you, which are dated February 19th?

A. Yes.

Q. And you brought them all together to Mr. Beebe's office, did you? A. Yes.

Q. How many letters did you find besides L—that is the one over there (indicating) and "M," and these three pages?

A. Well, I had several more, but I went through to find out about this land transfer, and these were the only things I [211] could find, so these were the only ones I brought.

(Testimony of Kaname Fujino.)

Q. Where are the several more?

A. I have them in the store.

Q. The next time you come to court, or if we have a recess, could we get the others that you have?

A. I will bring, the next time.

Q. And were they all together in Yamamoto's desk?

A. Yes.

Q. Well, do these—the three pages that I have shown you, dated the 19th—does that also refer to the land?

A. No.

Q. How was it that you brought those, or was that because, as I suggest, they were attached to "M"?

A. Those were together.

Q. But one letter, M, was written on February 20th?

A. Yes.

Q. And these three pages that I have shown you were dated February 19th?

A. Yes.

Q. And is it not likely that they were sent in the same envelope?

A. Yes.

The Court: What year?

Mr. Jansen: 1941.

Q. That is 1941? [212]

A. Yes.

Q. Exhibit L has a stamp on it, 1941, and M, the Exhibit M, and these three pages that I am showing you, dated February 20, 1941, do not have any such stamp?

A. Yes.

Q. On that there is a stamp from the Oahu Junk Company—on Exhibit L?

A. Yes, I believe it must be.

(Testimony of Kaname Fujino.)

Q. So, outside of the fact that "M" and these three pages I have been discussing were together, there is nothing to indicate that they were received together, but you think they were received together, in that same envelope? A. Yes.

Q. These pages which are numbered 1, 2 and 3, of the letter dated February 19, 1941, were likewise written by Patao? A. Yes.

Q. Who, you say, was your father's secretary? A. Yes.

Mr. Jansen: May it please the Court, at this time I will offer the letter which has been identified by the witness, dated February 19, 1941, consisting of three pages, numbered 1, 2 and 3, written by Patao Fujino, for Yotaro Fujino, and ask that the original letter be marked as a defendant's exhibit, and we have agreed with counsel with regard to a translation, and we ask that that be lettered "A" of the [213] exhibit number, and we offer both.

Mr. Beebe: No objection, if your Honor please.

The Court: Very well. It may be marked as the government's exhibit next in order, with the translation being given an "A" marking. That is the February 19th letter?

Mr. Jansen: Yes, your Honor.

(Documents offered in evidence are received and marked: Defendant's Exhibits 5 and 5-A, respectively.)

[Defendant's Exhibit 5-A set out on pages 455 to 457.]

(Testimony of Kaname Fujino.)

Mr. Jansen: May it please the Court, I would like at this time to read the translation of this letter written by Takeo Fujino for Yotaro Fujino, and, incidentally, the translation is apparently signed "Yotaro" but I guess we will all agree it is written by Takeo.

Mr. Beebe: Yes.

(Mr. Jansen reads the exhibit referred to to the Court.)

Q. It is signed "Yotaro Fujino." Is that correct, did he actually sign your father's name?

A. No, he signed his name.

Q. But you know that it was Takeo's handwriting?

A. Here he has my father's name. (Indicating.)

Q. Right there? (Indicating.)

A. Yes. And at the end, "written by."

Q. You keep looking at Exhibit M.

A. Yes.

Q. We are talking now about a different exhibit, which is [214] a differently dated letter.

A. This is my writing; my father's name. (Indicating.)

Q. But you know that is Takeo's handwriting? (Indicating.) A. Yes.

Q. And your father's name is written just as though he had signed it, but in fact it was signed for him by Takeo? A. Yes.

(Testimony of Kaname Fujino.)

Q. Now, Kaname, you were in Japan in February, 1941? A. Yes.

Q. And did you know that your father had this correspondence between him and the Oahu Junk Company about these things, about scrap rubber to be shipped from here, and cement to be shipped back from Japan? A. Yes, roughly I knew.

Q. Roughly you knew? A. Yes.

Q. And you knew what he was talking about when he was talking of the strained relations between Japan and the United States.

A. I didn't know the details, but it was in there.

Q. You didn't know the details, but you knew that there existed some feeling of strained relations between Japan and the United States?

A. At that time, as for myself, I didn't think too much.

Q. Well, you were going to school? A. Yes.

Q. But I assume your father mentioned it from time to time; just casually, perhaps?

A. Maybe.

Q. In a general fashion. I don't mean he sat down and discussed politics or anything, but he mentioned it, and you know that he had a feeling about a strained relation? A. I don't know.

Q. Did he mention it?

A. I don't recall his mentioning to me about it. As for myself, I didn't think at that time that it was too strained.

Q. Your father, however, speaks of it in this letter? A. Yes.

(Testimony of Kaname Fujino.)

Q. Do you know how he wrote these letters that were written by Takeo? Did he tell him—did he dictate the letter to Takeo, or what did he do?

A. He just gave him the main points, I believe.

Q. Gave him the main points? A. Yes.

Q. And tell him to write the letter?

A. Yes.

Q. Do you know if your father would read the letter before it would go out? A. I believe so.

Q. You think he would? A. Yes. [216]

Q. And I assume if there was something in there that he didn't approve, he would call in Patao and change it? A. Yes.

Q. He would not have the letter go out unless he read it first, would he? A. I believe so.

Q. Yes, he would not. That is what you mean, isn't it. Let me ask you again, to make sure I get that straight. Would he permit a letter to go out without reading it? A. No.

Q. No? A. No.

The Court: We will take our recess at this time.

(A recess was taken at this point, and thereafter, all parties being present as before, the following further proceedings were had:)

Q. I think when we recessed, Kaname, we were talking about the strained relations between Japan and the United States. You said you had no opinion, or your opinion was not as strong about that as your father's?

(Testimony of Kaname Fujino.)

A. Yes. The way I felt, there wasn't too much strained relations, and, in fact, even when I left, I didn't think—even the atmosphere there—I didn't think there would be any war. Of course there was, you know, a little talk about it. Of course there were a little strained, more than about a year [217] before.

Q. Well, it was worse than it was about a year before?

A. Yes, but we never think that a war would come.

Q. There was a certain amount of feeling on the part of the Japanese people in the way they thought they were being treated, wasn't there?

A. No, they didn't think to the point that there would be a war.

Q. I realize that, but there still was a feeling, running pretty high, that they were not being treated right by the United States?

A. No, I would not put it in that way.

Q. How would you put it?

A. Well, that it was a little more than a year ago, but that——

Q. It was a little worse than it had been the year before?

A. Yes, but not to the point that everybody was thinking that they would fight.

Q. I see. They had not reached that point yet?

A. Yes.

(Testimony of Kaname Fujino.)

Q. But one of the reasons why you came here to go to school, rather than in Japan, was because you were fearful that that might get worse, was it not?

A. No, because I just wanted to come back here. I wanted to come to Hawaii, my home. I had no intention of making [218] Tokio my permanent home. I knew I had everything in my estate here.

Q. Your father's estate was here? A. Yes.

Q. Your estate was here? A. Yes.

Q. Your fathers' estate was here, too?

A. Yes; I knew what he had he would give me, because I was the only son.

Q. It would eventually go to you?

A. Yes, I——

Q. But at that time your father was 55?

A. About that.

Q. One of the reasons why your father organized this corporation and transferred this land was because of that rising feeling in Japan, was it not?

A. I won't say that. 1940 I didn't think—I didn't feel that way.

Q. You didn't feel that way? A. No.

Q. Do you know whether or not your father felt that way?

A. No; none of those international affairs.

Q. He told you what he was going to do, and you just fell right in line with it, isn't that the way it was?

A. Yes, roughly, yes; he said he would give me some [219] shares, and I felt that he would give me.

(Testimony of Kaname Fujino.)

Q. Now when this land was transferred; that is, the date of the deed, in March, 1941, did you know what the land was worth? A. No.

Q. When Tsuda and Tsutsumi told you what rent they would pay, did you know what the land was worth?

A. Well, I knew it was worth several—thousands of dollars; I cannot say how much.

Q. I mean, were you able to form an opinion as to the reasonable value of the land at that time?

A. Oh, when they say three hundred, I think it was worth that much.

Q. But you have had no experience in that?

A. Oh, no.

Q. You accepted their statement? A. Yes.

Q. You did not question that at all?

A. No. Well, I cannot question them, the manager and assistant manager, and they are faithful for so many years; I don't think they would put anything over on me.

Q. You felt, though, you could not question them?

A. Yes, they were trusted, long-time employees.

Q. When you say "long-time employees" you mean long-time employees of your father? [220]

A. Yes.

Q. Now you got a check for rent, the first one, in August, 1941? A. Yes.

Q. And that was for six months, wasn't it?

A. I don't recall for how many months, but I knew for several months.

(Testimony of Kaname Fujino.)

Q. Back? A. Yes.

Q. It went back at least beyond May?

A. I think so.

Q. Ahead of May; it probably went back to March, 1941? A. Yes.

Q. And you put the eighteen hundred dollars in the bank? A. Yes.

Q. And then the next month you got another check for three months' rent, do you remember that? A. Something like that, yes.

Q. And that would be \$900? A. Yes.

Q. And you put that \$900 in the bank?

A. Yes.

Q. Now, how much of that eighteen and nine; that would be twenty-seven hundred——

A. Yes.

Q. How much of that did you send to your father? [221]

A. I never sent any money to him.

Q. You never sent any? A. No.

Q. You intended to send him some?

A. I never had such notions.

Q. Didn't you intend to send him some money?

A. No.

Q. In August or September, 1941?

A. No.

Q. Are you sure of that?

A. I don't—no.

Q. Well, did you or did you not intend to send him some money? A. No.

Q. You did not? A. No.

(Testimony of Kaname Fujino.)

Q. Was he getting any rents from any other property here in Hawaii? A. No.

Q. Was he getting any dividends from the corporation? A. No; at that time, no.

Q. Was he getting any salary from the corporation? A. No.

Q. Had he received any rents between December, 1940, when the corporation was formed, and March, 1941, when this deed [222] was executed, from the corporation? A. I don't know.

Q. You mean that you did not intend to send him any money in 1941, before the war started?

A. No. Well, he was well off; I didn't think why he should ask me.

Q. But you said his estate, his business, was really here in Hawaii? A. I said my estate.

Q. I thought you said your father's estate, too?

A. No, I said I had my estate in Hawaii.

Q. The only business your father had was the business of the Oahu Junk Company, wasn't it?

A. Yes.

Q. And that was located here in Hawaii?

A. Yes.

Q. The only income that he would receive would be income from the Oahu Junk Company, wouldn't it? A. I would not know.

Q. What is that? A. Well, I don't know.

Q. If your father had given you a letter and—had written a letter to you and told you to send him some money, you would have sent it, wouldn't you? A. He never did. [223]

(Testimony of Kaname Fujino.)

Q. If he had written to you and told you to send some from the rents you would have sent it, wouldn't you?

A. I didn't have the faintest idea to send him.

Q. If your father had written to you and told you to send money from the rents, you would have sent it, wouldn't you?

A. Maybe.

Q. Yes. Well, it is true, isn't it?

A. Yes.

Q. Yes. As a matter of fact, Mr. Yamamoto took over \$850 from your mother when he went to the Orient, didn't he; some eight hundred dollars; around that amount?

A. I think so.

Q. Out of rents that had been received?

A. Yes.

Q. From that property, her property, the property that had been deeded to you; that is correct, isn't it?

A. Yes.

Q. You didn't get any of that \$800, when you were in Japan, when he came there, did you?

A. No.

Q. And that was the property that you say you found out when the Custodian had vested it, that she had reserved a life estate?

A. Yes. [224]

Q. But, nevertheless, she collected this money, and Mr. Yamamoto brought her \$800 from the rents for that when he came to the Orient in 1941, didn't he?

A. Yes.

Q. And if your father had written to you and said, "Send me a thousand dollars from the rent," you would have sent it, wouldn't you?

A. Maybe.

(Testimony of Kaname Fujino.)

Q. Yes. Well, would you? A. Yes.

Q. "Yes"? A. Yes.

Q. You do not know of any property that your father owned, that is, property outside of the Oahu Junk Company, do you? A. No.

Q. Did he own the house that he lived in, in Japan? A. Yes.

Q. But he had no business there?

A. He had his house and lot.

Q. His house and lot? A. Yes.

Q. But other than that he had no other property in Japan? A. I don't think so.

Q. And no other business in Japan?

A. No. [225]

Q. And, if he had, he had it in the Oahu Junk Company here in Hawaii; that is correct, isn't it?

A. Yes.

Q. Now, Kaname, there is one little question I wanted to clear up. When you were referring to Exhibit "M," Mr. Beebe asked you one question about the word "kirikae"? A. Yes.

Q. That is the word for which the English word "change" is here used? A. Yes.

Q. Now "kirikae" literally translated means "cut and change," doesn't it?

A. Yes. Well, that means to give, isn't it?

Q. Did you check this translation with Mr. Beebe before we agreed upon it?

A. Yes, I did agree to.

(Testimony of Kaname Fujino.)

Q. Do you agree that the word "change" is the correct connotation? Do you think we have given it the correct connotation?

A. To change or transfer.

Mr. Beebe: What was that you said?

Witness: Change or transfer.

Q. What I am trying to get at, Kaname, is where you get that word "transfer"?

A. Well, you can take it in many meanings. "Kirikae"—well, it [226] just come to my mind, to change or transfer.

Q. But we have agreed on "change." That is the better translation, isn't it? You had first translated it to mean "transfer," didn't you?

A. Yes, I did.

Q. But "change" is a little closer to the exact translation; exact meaning, isn't it?

A. Well, when I first "transfer," I just had in mind "transfer."

Q. That was sort of wishful thinking, huh?

A. Well, I cannot say exactly.

Q. You were not familiar with the business of the Oahu Junk Company when you came here in May, 1941? A. No.

Q. And when Tsuda and Tsutsumi told you to sign the mortgage note for this land, you just went down and signed it? A. Yes.

Mr. Beebe: I object to the question as calling for, or assuming a state of facts not in evidence, if the Court please. I do not recall that he said that Tsuda or Tsutsumi told him to sign that. My recollection is that the bank told him to sign that.

(Testimony of Kaname Fujino.)

The Court: That's right. The other people told him to go and get a deed and record it, so that was a purpose for which he went to the bank, but when he got to the bank he told us [227] that they would not give him a deed until he endorsed the note.

So, will you reframe your question?

The answer was in. It may go out, and the question will be reframed.

Q. You signed this note that has been received here as Plaintiff's Exhibit K, in May, 1941?

A. Yes.

Q. Did you discuss your signing it with Tsuda and Tsutsumi?

A. When I went to the bank they said I have to endorse it, so I endorsed it.

Q. You mean on their say-so; nobody else? You went to the bank, you recall, and asked them for the deed?

A. Yes.

Q. The bank said "Here is a note. You endorse that."

A. They said I have to make note for it, and so I signed it.

Q. Without talking to anybody else about it?

A. Oh, I know Tsuda and Tsutsumi told me.

Q. They told you you would probably have to sign it, before you went to the bank, didn't they?

A. Yes.

Q. (By the Court): Were they with you when you went to the bank?

A. No, I went myself.

(Testimony of Kaname Fujino.)

Q. So before you went to the bank, Tsuda and Tsutsumi said [228] "Well, there is a note down there," in effect, and you would probably have to sign that and endorse it, too? A. Yes.

Q. And following their instructions—it was following their instructions that you did endorse this note; correct? A. Yes.

Q. In fact, you knew so little about the business, the affairs of the business, that you were guided entirely by what Tsuda and Tsutsumi told you that you should do?

A. Yes, I had faith in them. Yes, I trusted them.

Q. They had been your father's attorneys-in-fact for many, many years? A. Yes.

Q. Since he left for Japan in 1935?

A. Yes; I had no doubt about them.

Q. There is one thing that is not quite clear to me, Kaname. I got the impression that you started to work for the Oahu Junk Company soon after you came over, but then you also said you went to school. Did you work and go to school at the same time? A. Yes, I did.

Q. Did you go to day classes?

A. Day classes.

Q. Well, of course when you came in May you didn't start school then? [229]

A. At September.

Q. You worked through the summer?

A. Yes.

(Testimony of Kaname Fujino.)

Q. And when school started in the fall you started school? A. Yes.

Q. And you went to school most of the day, as you could you would help out, in the evenings or on Saturdays or free days?

A. In the afternoon.

Q. In the afternoon? A. Yes.

Q. But you continued on in school until a year and one-half later? A. Yes.

Q. That would be in the fall of 1942, or the spring of 1943; do you remember?

A. Yes, I think it was the spring of 1943.

Q. And all you did was to help out; that is, clerk in the store, or do other little tasks that you could do in your free time? A. Yes, by then.

Q. And Tsuda and Tsutsumi would ask you to do this, or ask you to do that, and you would sort of——

A. And then I began to keep, to run the book-keeping machine, and going through the bookkeeping system, and gradually [230] trying to learn more and more.

Q. And about the time in 1943 that you stopped going to school you had acquired some working knowledge of the business, the books and so on, the accounts, and so on? A. Yes.

Q. But all during that time the entire operation of the business; the decisions that were to be made, and all, were left entirely to Tsuda and Tsutsumi?

A. Yes; they were much more mature than me.

Q. In fact, you weren't ready? A. Yes.

(Testimony of Kaname Fujino.)

Q. To step into your father's shoes, and to run the business, until 1942 or 1943, were you?

A. Yes.

Q. I say: You were not ready to step into your father's shoes? A. Yes, I wasn't ready.

Q. Now do you remember how much of that money that you collected for these rents, approximately how much you paid out to your sisters?

A. Oh, I cannot say how much. I did not itemize them.

Q. Well, was it more than fifteen or twenty dollars? A. Yes.

Q. A considerable amount? A. Yes. [231]

Q. Was there ever any expectation that they were to pay it back, or did you just give that to them?

A. Oh, just give. I didn't expect anything back.

Q. You didn't expect anything back. You just gave that to your sisters? A. Yes.

Q. And would you say that that amounted to hundreds of dollars?

A. Yes; may be one hundred dollars.

Q. Hundreds? More than a hundred?

A. Yes.

Q. Whatever they needed?

A. Yes, if I can help. At that time I could afford it, I just gave it.

Q. And you never expected to get any of it back?

A. No, I did not care to get it back.

(Testimony of Kaname Fujino.)

Q. In fact, would you say you did just what you would expect your father to do, if he were here? He would do the same thing, and you would like to do the same as he would do if he were here?

A. Yes, brothers and sisters, and I did not care to force it and get it back from my sisters. You know—not to outsiders.

Q. Well, you felt you were sort of standing in your father's shoes here, and that as far the family were concerned you had the same position, and you would do the same as [232] he would do if he were here?

A. Yes, because I am the boy; I am supposed to look after my sisters, as the oldest son.

Q. You were expected to do that?

A. Yes, I expected to look after that.

Q. And that was because you were the oldest son, and you were expected to step in to your father's shoes?

A. Yes.

Q. As the head of the family?

A. Yes.

Q. Especially when he was away in Japan?

A. Yes; he was not here.

Q. There is one other question I do not quite understand. When you extirpated yourself you said that you had sent that certificate to Koseki?

A. Yes.

Q. That is, the registration of your family in Japan?

A. Yes.

Q. Now what did you do that for?

A. Well, for to let them know that I was not a citizen any more of that place.

(Testimony of Kaname Fujino.)

Q. Well, did that also throw you out of the family?

A. Yes, according to Japanese custom I am an outsider, a foreigner to them.

Q. In Japan? [233] A. Yes.

Q. Well, didn't you feel that it had thrown you out of the family; as far as you and your father, and sisters, were concerned?

A. Yes, I knew I was out, because I intended to come back to Hawaii and I knew I could not get my father's house and lot over there.

Q. In Japan? A. Yes.

Q. But, as far the property in Hawaii was concerned——

A. Oh, I naturally expecting to get it.

Q. Did you and your father talk about you doing this—extirpation? A. Yes.

Q. He approved of that? A. Yes.

Q. And that was in 1939? A. Yes.

Q. That was before you were twenty-one?

A. Yes, I was 20; just before 20.

Q. Was it because you wanted to remove that idea that there might be dual citizenship that you—you know what dual citizenship is?

A. Yes.

Q. Is that one of the reasons you extirpated yourself [234]

A. Yes; I wanted to come back.

(Testimony of Kaname Fujino.)

Q. You and your father had discussed that?

A. Yes, he did ask me if I wanted to get my Japanese citizen, and or cut my Japanese citizen, and I said, "Oh, yes, I didn't expect to live there permanently with them; I wanted to come back to Hawaii."

Q. You discussed that and thought that would be best?

A. Yes.

Q. So far as the property in Hawaii is concerned it would be advantageous to do it?

A. Oh, not that, but just—that I wanted to come back, and if I stayed there I might get stuck over there.

Q. What do you mean, you might get stuck over there? Did you think war was coming on?

A. No, not that. If I stayed there I might have to go to the Japanese army, and I didn't want to go.

Q. Do you mean in the event of war?

A. Yes.

Q. And you thought at that time that there might be a war?

A. No, not that, but I was about that age, too; about 20, the draft-age, but I didn't want to go.

Q. You did not want to go in the Japanese army?

A. Yes.

Q. You thought at that time there was a possibility of a war? [235]

A. Oh, no, there wasn't any at that time.

Q. You are sure of that?

A. I didn't feel it.

Mr. Jansen: I think that is all.

(Testimony of Kaname Fujino.)

Redirect Examination

By Mr. Beebe:

Q. Kaname, according to law all Japanese—the law of Japan, when a boy becomes of age, what happens to him, so far as the army is concerned?

A. Oh, they get drafted.

Q. And that is true whether there is war or peace or anything else, isn't that true?

A. Yes, even in peace times they would get drafted.

Q. And how long a period of time do they have to spend in the army, during ordinary times, when boys become of age?

A. I don't know; maybe one or two years, maybe.

Q. One or two years. Do you know what effect, if any, that might have on your coming back?

A. Oh, I would lose my American citizenship.

Q. And is that the primary reason or a part of the reason why you gave up your dual citizenship?

A. One of the reasons, because I wanted to come back here.

Q. Now there was a question put to you that if your father had asked for one thousand dollars, whether you would have sent it to him, and you answered that you would. Now would you have sent [236] it to him because you felt that the thousand dollars was his or because you felt that as a dutiful son you should send him money if he needed it?

A. Oh, because he needed it; because I would sent it.

(Testimony of Kaname Fujino.)

Q. Did you have any feeling that any of that rental money belonged to your father?

A. No, I never had such feelings.

Q. Now, Kaname, have you in your files a copy or the original of the deed from your mother to yourself, of the year 1934 or 1935, in which she retained the life estate?

A. It is at the Bishop Bank.

Q. You are sure that you haven't that deed here?

A. No.

Q. Do you think you can borrow it?

Mr. Jansen: I have a photostatic copy of that.

Mr. Beebe: I think I would like to introduce that, so that it may be before your Honor.

The Court: We will take a recess at this time.

(Recess.)

The Court: There seems to be an agreement that there was such a deed reserving the life estate to the mother. Can we not proceed on that, gentlemen, and you can supply a copy of it later if you think it is necessary.

Mr. Beebe: Yes, that is all right.

The Court: It is agreed that there was such a deed, in [237] which the mother transferred her property to the plaintiff, reserving to herself a life estate?

Mr. Jansen: That's right.

Mr. Beebe: As I understand it, she transferred a piece of property to him, reserving a life estate. I understand that there was another piece——

(Testimony of Kaname Fujino.)

Mr. Jansen: Whatever she transferred she reserved a life estate in. I know that.

Q. (By Mr. Beebe): Now, do you know whether or not, after your mother transferred that piece of property to yourself, retaining a life estate in herself, whether she had any other property here?

A. Yes, she had.

Q. And was that retained in her own name?

A. Yes.

Q. Now this piece of property that she retained in her own name, was that rental property or was it unimproved? A. Rental property.

Q. What type of improvements were there on that particular piece of land?

A. A home, used for rental purposes.

Q. Just one house? A. A Duplex home.

Q. And has that been rented out ever since your return to [238] Hawaii? A. Yes.

Q. Now is that piece of property—still dealing with the piece of property that your mother retained in her own name—is that piece of property any of the pieces shown on Government's Exhibit Number 1, 2 and 3?

A. No, it is not in here.

Q. Well——

A. Yes, it is in here. This is——

Q. Wait a minute. Let's not get the record gummed up. Exhibits 1, 2 and 3 show five parcels, the land numbered 1, 2, 3, 4, 5 and 6; that is, parcels of land. Now is the piece of property which your mother retained in her name any one of those six parcels of land shown on those exhibits 1, 2 and 3?

(Testimony of Kaname Fujino.)

A. No.

Q. But it is, as I understand it, in the neighborhood of these parcels shown on Exhibit 1, 2 and 3?

A. Yes.

Q. Now after your return from Japan to Hawaii who collected the rentals on that piece of property, if you know? A. After I returned?

Q. Yes. A. I acted as agent. I collected.

Q. You collected the rentals? A. Yes.

Q. What did you do with the money?

A. I put it aside.

Q. Put it aside where?

A. In her own check account.

Q. In her own checking account. Did she have a checking account here? A. Yes.

Q. Where was that checking account?

A. With the Bishop National Bank.

Q. Now did you continue right up to date collecting the money or collecting the rentals and placing that in her checking account in the Bank of Bishop? A. Yes.

Q. Now was that property ever seized by the Alien Property Custodian? A. Yes, it was.

Q. When? A. In——

Q. Approximately?

A. I think December, 1944.

Q. December of 1944. What happened to the rentals after December, 1944, when the Alien Property Custodian seized the property?

A. Well, the Alien Property Custodian got it.

(Testimony of Kaname Fujino.)

Q. So then say if this is correct: Up to December of 1944 [240] you collected the rental from that particular piece of property and you put it in her bank account? A. Yes.

Q. And then after the Alien Property Custodian seized it he acted as agent and collected the rental, is that correct?

A. Yes. I had nothing to do thereafter.

Q. Now did you draw on your mother's account at all? A. On that? No.

Q. Then I assume that that account was seized by the Alien Property Custodian also?

A. Yes.

Q. Is that right? A. Yes.

Q. Now she had another piece of property, or, rather, she retained a life estate in another piece of property. Will you tell the court; was that property improved or unimproved?

A. Improved.

Q. What kind or type of improvement was there on that property? A. With rental units.

Q. How many rental units?

A. About seven.

Q. And is that property any one of the six pieces of property that are shown on Government's Exhibit 1, 2 or 3? A. No. [241]

Q. Is it in the neighborhood? A. Yes.

Q. And was that property rented at all times subsequent to your return to Hawaii?

A. Yes.

Q. And who collected the rental on that property? A. After I came back, I did.

(Testimony of Kaname Fujino.)

Q. After you returned to Hawaii in May of 1941 you collected the rental, did you? A. Yes.

Q. And appropixmately what was the rental per month that you collected from this second piece of property? A. Oh, about one hundred dollars.

Q. Is this the piece of property that you referred to in your prior testimony as "Camp"?

A. Yes, that is the one.

Q. What is it; different small houses on one piece of land, or two-story or three-story houses?

A. Oh, one-story houses; one-story houses.

Q. And did you say there were seven units?

A. Yes.

Q. And those units rent for approximately how much per month?

A. Oh, fifteen to twenty dollars.

Q. Fifteen to twenty dollars a month? [242]

A. Yes.

Q. And what does the rental include? How about the water, lights and so on and so forth?

A. Oh, I paid the water bill, and repairs.

Q. Light? A. Light, tenants pay.

Q. So your monthly returns from that property were approximately one hundred dollars a month, is that correct? A. Yes, about that much.

Q. And what did you do with that one hundred dollars a month? A. Oh, I threw it in——

Q. After you started to collect it?

A. I put it in my check account.

Q. In your own check account, and not in your mother's checking account? A. No.

(Testimony of Kaname Fujino.)

Q. No. Now, which? Did you put it in your own account? A. In my account.

Q. And it did not come into your mother's accounts as did the moneys from the first piece of property we have been talking about?

A. No.

Q. And that checking account was in what bank?

A. The Bishop National Bank, also. [243]

Q. And, Kaname, when, if you recall, did you start that bank account in the Bishop National Bank? A. Mine started in August of 1941.

Q. August of 1941? A. Yes.

Q. You returned in May of 1941? A. Yes.

Q. The rentals of \$100 per month that you collected on the second piece of property we have been referring to, what did you do with those moneys, between May or June, when you started collecting, and August?

A. Oh, I just had it in an envelope.

Q. An envelope where?

A. Oh, I had it at the store.

Q. Did you have a safe in the store?

A. Yes.

Q. Am I safe in assuming then that you kept it in an envelope in a safe in the store?

A. Yes.

Q. All right. It has come out in the examination that the first check you received as rental from the premises shown in Exhibit 1, 2 and 3, in August, was in the amount of eighteen hundred dollars?

A. Yes.

(Testimony of Kaname Fujino.)

Q. Was that for six months back, or do you know? [244]

A. Oh, I cannot—I do not know.

Q. Was that in cash or in a check?

A. I believe in cash, and I brought it down to the bank.

Q. You believe in cash and you brought it down to the bank? A. Yes.

Q. Now where is your bank book?

A. I have it at the store. The checking account is closed already, though.

Q. Well, can you tell us off-hand, or do you remember what amount your first deposit in the bank was?

A. Several thousands dollars—for it was \$1800 or more; I cannot say exactly how much.

Q. During the noon hour will you go through your things down there and get the bank book and bring it up here? A. All right.

Q. Now you said that Yamamoto took \$850 to your mother at the time he went to Japan, just prior to his death? A. Yes.

Q. How do you know that?

A. Oh, later on I found out. When Yamamoto came, I was in Japan at that time.

Q. Were you there when Yamamoto gave your mother \$850?

A. Well, I didn't know about it.

Q. When did you know about it, and where did you find out? [245]

A. After I came back and looked in the books.

(Testimony of Kaname Fujino.)

Q. You looked in the books, of what?

A. Of the rental collections.

Q. Where were those books kept?

A. Why at the store. It was my books, and I left them there.

Q. While you were in Japan who collected the rental on your mother's property, the store or Yamamoto, or who?

A. I think Mr. Tsuda and Tsutsumi.

Q. You maintain an account there in the store showing these rental collections, is that it?

A. I had a separate book and put it in a separate account.

Q. Did you say "I"?

A. Yes. Well, before I came back somebody else was doing it.

Q. Well, is this correct, then, that in the Oahu Junk Company there was a separate set of books, that separate set of books showing collections of rental on your mother's property, and then an \$850 withdrawal? A. Yes.

Q. By Yamamoto? A. Yes.

A. Is that correct? A. Yes.

Q. And do you remember approximately when that withdrawal [246] was made, according to the books? A. Maybe about March.

Q. March of the year 1941? A. Yes.

Q. What year? A. 1941.

(Testimony of Kaname Fujino.)

Q. Now there has been considerable testimony about this five hundred dollar contribution made to Tsutsumi's brother?

The Court: Tsutsumi's brother who was getting married?

A. Yes.

Q. When did that marriage take place, if you recall? A. It was September of 1941.

Q. Had Tsutsumi been employed by the Oahu Junk Company prior to that time? A. Yes.

Q. Was he employed by the Oahu Junk Company at that time? A. Yes.

Q. Now do you recall whether or not you received a letter—I will withdraw that.

Do you recall to whom the correspondence was addressed about the \$500?

A. I cannot say exact, but maybe it was to the company.

Q. Well, do you remember whether it was letters, or what it was?

A. I think it was a cablegram. [247]

The Court: From?

Q. From whom? A. From my father.

Q. And to the best of your recollection it was to the company, is that right? A. Yes.

Q. During the noon hour will you make an effort to ascertain whether or not that telegram is in your files? A. All right.

Q. And if it is not, see if you can get it, from the telegraph company? A. Yes.

(Testimony of Kaname Fujino.)

Q. All right. Do you have any recollection of whether or not you talked the matter of making this contribution over with Tsutsumi and Tsuda?

A. Yes, I think we read it together.

Q. Well, can you tell the Court whether or not the question was taken up as to whether or not the corporation should or should not make the contribution, or whether you should make the contribution?

A. Well——

Q. Do you understand the question?

A. Beg pardon? I would like to hear it again.

Q. Let's go back. You got the telegram?

A. Yes. [248]

Q. And the telegram was addressed to the Oahu Junk Company?

A. Yes.

Q. As you recall?

A. Yes.

Q. The telegram told you to make the contribution of five hundred dollars?

A. Yes.

Q. Did you talk to Tsuda and Tsutsumi about it?

A. Yes.

Q. Now, did you talk to them about who should make the contribution; whether the corporation or whether you should make it yourself, as a member of the family?

A. Yes, I think we did.

Q. Did you arrive at any conclusion?

A. Yes, because I made out the check.

Q. And you made out the check from your own funds, is that correct?

A. Yes.

Q. Was anything said about whether the corporation could or could not legally make the contribution?

(Testimony of Kaname Fujino.)

A. Well, I would not have known the legal aspects of it.

Q. I didn't ask you that. I said: Was anything said by either Tsutsumi or Tsuda or yourself as to whether or not the corporation could legally make the contribution? [249]

A. I don't know.

Q. You don't know. Is that your answer?

A. Yes.

Q. Well, do you recall whether or not it was talked over between the three of you?

A. Yes, and I made out the check with my funds.

Q. Well, did you make out the check from your own funds because you were told to do so?

A. Yes, we talked it over, and——

Q. You talked it over, and what?

A. And, well, I guess it was decided.

Q. I don't want any guessing. I want to know—if you recall.

A. It was quite sometime back, so I cannot recall too plainly.

Q. All right. And this payment was made when?

A. I think about September of 1941.

Q. That was approximately a month after you had opened your bank account?

A. Yes.

Q. Now had any of the funds, as you recall, that you had collected from your mother's property, gone into that account by the time that you paid this check of \$500?

A. From the life estate property?

Q. Yes. [250]

A. Yes.

(Testimony of Kaname Fujino.)

Q. Now with reference to that deed, I wish you would give us, as best you can, the sequence of events, when you first knew of the deed, and where you learned it, and when you first received it.

The Court: Which deed; the deed to the land by his father, or the mother's?

Mr. Beebe: No, the deed to the land by the father. I think it is Exhibit H. Thank you, your Honor.

The Court: Exhibit H; that's right.

A. The deed from my father to me?

Q. The deed from your father to you?

A. Oh, I first found out that he said he would give it to me before the incorporation, in 1940. That was about October or November.

Q. Of 1940?

A. 1940, yes, and before I came back he was telling me that he give it to me, so—and still go back to Hawaii and study hard and work hard and he said he had given the land to me.

Q. All right. Now what about the power-of-attorney that you gave to Tsutsumi and Tsuda; when did you first learn about that, and the circumstances?

A. Well, about 1940, October or November, about that time, just before the incorporation. [251]

Q. Did you expect to receive a form of power-of-attorney from Hawaii? A. Beg pardon?

Q. Did you expect to receive a form of a power-of-attorney from Hawaii that you were to execute in Japan and send back here? A. Yes.

(Testimony of Kaname Fujino.)

Q. You mentioned you learned that in October or November, is that correct?

A. I remember when my father gave it to me and told me to go to the American Consulate.

Q. Well, now, had you known about it prior to the time that your father gave it to you?

A. Yes, when he told me he was make me sign the notes. It was at that time.

Q. Well, then, in December it was received?

A. Yes.

Q. Is that correct? A. Yes.

Q. And your father told you to take it to the American Consulate? A. Yes.

Q. Is that correct. And you did take it to the American Consulate? A. Yes. [252]

Q. Who sent it back here, your father or yourself or whom? A. I believe my father.

Q. You believe your father.

The Court: Now there are so many powers-of-attorney in here. The one you have been talking about is which one?

Mr. Beebe: The power-of-attorney that I am referring to is the power-of-attorney from Kaname Fujino to Tsuda and Tsutsumi, which is Plaintiff's Exhibit I.

Mr. Jansen: I understood that is what you were speaking of; Kaname's power.

The Court: I am confused. Was there more than one by this plaintiff to those people?

Mr. Beebe: No, the other ones were by the parents.

(Testimony of Kaname Fujino.)

The Court: He said he saw this before he signed the notes. As I understand it, he did not sign the note at all; it was pursuant to the power-of-attorney that the note was signed?

Mr. Beebe: That's right.

The Court: Now does he mean signed the note at the bank?

Mr. Jansen: That's right. The power was given, he testified, as I understand it, to enable his attorneys-in-fact to sign the note, and that was the purpose of it.

The Court: He said he saw them before he signed the note. Does he mean before he endorsed the note at the bank?

Mr. Beebe: I don't get that.

The Court: It may not be crucial, but I was wondering if [253] there was another power-of-attorney here.

Mr. Beebe: I didn't get his testimony in that respect.

The Court: You are asking him when he first knew about this power-of-attorney, this form that was coming to Hawaii?

Mr. Beebe: Yes, that's right.

The Court: And he said he knew about it before he signed it—before he signed the notes.

Mr. Beebe: I would like to clear it up.

(Testimony referred to was read by the reporter to the Court.)

The Court: Oh, I misunderstood that.

(Testimony of Kaname Fujino.)

Q. (By Mr. Beebe): Now, the notes that you refer to, is that a note of twenty thousand dollars?

A. Yes.

Q. And was that note signed by you individually?

A. I knew my attorneys-in-fact signed it for me.

Q. You can go through the desk and bring certain correspondence, or bring all the correspondence?

A. Yes.

Q. And just to clear up the record, were you requested by me at any time to go through the desk and files down there to locate correspondence?

A. Beg pardon.

Q. Were you requested by me over the past several months to locate or try to locate correspondence having to do with this [254] case?

A. Yes.

Q. And was it limited in that respect? That is, try to find correspondence dealing with this case?

A. Yes, I tried to find.

Q. And the only correspondence that you can find are the letters that have been introduced here?

A. Yes.

Q. That is, dealing with the property; these two letters are the only ones that you could find, is that correct?

A. Yes.

Mr. Beebe: I think that is all for the time being, if the Court please.

Mr. Jansen: Well, with regard to this correspondence, Mr. Beebe, I got the impression that there were only a few letters; that is, whatever

(Testimony of Kaname Fujino.)

could be found in the desk would not amount to great reams of correspondence, and they were found in Yamamoto's desk, and I wanted him to produce whatever he found in the desk. Do you understand that?

Mr. Beebe: I see.

Witness: Yes, I could.

Mr. Jansen: Are there many?

Witness: No, not too many.

Mr. Jansen: Perhaps a couple of dozen?

Witness: Yes. [255]

Mr. Jansen: Would you bring them down early, so that we can look them over?

Witness: Yes.

The Court: Perhaps we would do well to take our noon recess now, and it might facilitate these letters being examined.

To what time would you like to reconvene, in view of these letters, 1:30 or 2?

Mr. Beebe: 1:30, your Honor.

Mr. Jansen: Yes.

Mr. Beebe: That is one of the reasons for doing this; we want to clear up the record. I told him to go down and find any correspondence that he could get, and relative to land, or this particular case. I just asked for the general correspondence.

The Court: All right. We will recess at this time until 1:30 p.m.

(Whereupon a recess was taken until 1:30 o'clock p.m., November 6, 1946.)

Afternoon Session

November 6, 1946, 1:30 P.M.

The Court: Are are parties ready?

Mr. Beebe: Ready for the plaintiff, if the Court please.

Mr. Jansen: We are ready.

The Court: Very well, you may proceed.

KANAME FUJINO

the plaintiff herein, resumed the stand for further examination, and testified as follows:

Redirect Examination

(Continued)

By Mr. Beebe:

Q. Kaname, during the noon hour did you locate the bank book that I asked you to endeavor to locate? A. Yes, Mr. Beebe.

Q. And have you a haole name?

A. Yes, I do.

Q. What is that haole name? A. Rieke.

Q. Rieke? A. Yes.

Q. Was this bank account in the Bishop National Bank of Hawaii opened in the name Rieke Fujino? A. Yes.

Q. (By the Court): Where did you ever get that name of "Rieke"? [257]

A. It is not my legal name.

(Testimony of Kaname Fujino.)

Q. (By the Court): What is your name?

A. I was born "Kaname Fujino."

Q. (By Mr. Beebe): Is the name you adopted the same as a great many boys of Japanese ancestry do; taking the name of Harry, Richard, or something of that kind? A. Yes.

Q. It never was validated by the government?

A. No.

Q. Now I wish you would examine this bank book and see if you can refresh your recollection as to whether the funds, other than the \$1800, that was received as rentals from the Oahu Junk Company, were used in making the first deposit?

A. Yes.

Q. The first deposit is how much?

A. \$2,484.97.

Q. And the second deposit is how much?

A. Nine hundred dollars.

Q. Do you recall what that \$900. was for, or from whom you obtained it?

A. Yes, I received it either from Mr. Tsutsumi or Mr. Tsuda.

Q. What did it represent? A. Rental.

Q. On the property that you had rented to them under verbal [258] lease, of \$300. a month?

A. Yes.

Q. Then the different in the first deposit, between eighteen hundred dollars and twenty-six hundred dollars, which you deposited, where were those funds?

(Testimony of Kaname Fujino.)

A. Oh, that I don't know. You ask my attorneys-in-fact.

Q. Did any of it represent collections made by you from what you have termed the Camp premises?

A. Yes, I believe so.

Q. And there are other odd amounts in there deposited from time to time or from period to period. Were some of those rentals from the Oahu Junk Company and other rentals that you had collected from your mother's property?

A. Yes; they were all put in one.

Q. The property that I am referring to is the property that she obtained a life estate in?

A. Yes.

The Court: Once again, that first figure was what?

Mr. Beebe: That was 2,484.

I think that is all.

The Court: Didn't you ask for a cablegram, too?

Mr. Beebe: Oh, yes. Did you locate them?

Witness: Yes.

The Court: I may be mistaken. You may have been the one who asked for it, Mr. Jansen. [259]

Mr. Jansen: No.

Mr. Beebe: I asked for it, if the Court please.

The Court: You don't have to cover it now. I was just trying to refresh your recollection. If you have any plan, it is all right.

(Testimony of Kaname Fujino.)

Recross-Examination

By Mr. Jansen:

Q. Until you started this checking account on August 22, 1941, you had no checking account, did you? A. No.

Q. And it was on the occasion of your receiving the first large check for rent, of \$1800., that you started this checking account? A. Yes.

Q. And who advised you to start the checking account? A. My attorneys-in-fact.

Q. Your attorneys-in-fact advised you to start the checking account, and it was following their advice that you did start the checking account?

A. Yes.

Q. So on August 22, 1941, you deposited the \$1800., and \$684.97 that you had on hand from other rentals and things? A. Yes.

Q. And you put that all in your checking account? A. Yes. [260]

Q. Then on September 22nd, a month later, you got an additional \$900. rent from the Oahu Junk Company that you deposited? A. Yes.

Q. Now you have explained that out of this checking account you paid, in accordance with instructions from your father—you paid five hundred dollars to Tsutsumi for a wedding present?

A. Yes.

Q. And I think Mr. Beebe asked you whether or not you had a cable about that? A. Yes.

(Testimony of Kaname Fujino.)

Q. And that was in August or September, 1941, to your best recollection?

A. Yes, it must be about that time.

Q. Perhaps a short while after you put this money in the bank?

A. (Witness looks at folder.)

Q. While you are looking that up, I will ask you another question.

Now, calling your attention again to Plaintiff's Exhibit N and N-1, this gift tax return and the check, did you sign the gift tax return, or was that signed by the attorneys-in-fact?

A. I don't know. It must be the attorneys-in-fact.

Q. You do not recall signing it? [261]

A. No.

Q. And the check is signed Yotaro Fujino by the attorneys-in-fact, is that right? A. Yes.

Q. That is a check on the Bishop National Bank of Hawaii? A. Yes.

Q. Your father had a separate bank account in the Bishop National Bank of Hawaii?

A. Yes.

Q. Do you know where the money came from that went into that bank account?

A. Oh, when I came back it was there already.

Mr. Beebe: I didn't hear that.

A. When I came back it was there already; that check account was there already.

The Court: The father's?

(Testimony of Kaname Fujino.)

A. My father's, and he had some Honolulu stock; brewery stock, and dividends come in.

Q. Yes, but they were not that much money though, \$700., were they?

A. No, they were small amounts.

Q. They were small amounts. Did you put money in your father's bank account from time to time?

A. Yes; just those stock dividends, when they came in, I deposited. [262]

Q. Did you put anything from your checking account into your father's?

A. No, not from my side; I never did.

Q. Let's see; you started this checking account of yours on August 22, 1941? A. Yes.

Q. You know of your own knowledge, don't you, that on July 25th or 26th, 1941, your father's checking account was frozen, wasn't it?

A. Yes, I recall that there was a freeze order, yes.

The Court: What was the date, again?

Mr. Jansen: July 26th, 1941.

Q. And you and the attorneys-in-fact talked about the freezing order, didn't you?

A. Yes.

Q. And you knew that both your father's account and your mother's account were frozen, because they were both living in Japan? A. Yes.

Q. And that is the reason you started your own checking account, isn't it?

A. Well, I cannot recall exactly why.

(Testimony of Kaname Fujino.)

Q. One of the reasons you started your own checking account was because your father's and mother's account had been frozen, wasn't it—one of the reasons? [263]

A. I had it in an envelope before that. It is better to put it in the bank, so I put it in.

Q. From July 25th or 26th, 1941, until August 22nd, you kept it in an envelope at home?

A. At my place of business.

Q. And when you got the \$1800. and with the money that you had in an envelope, because your father's account had been frozen, you started your own account, didn't you?

A. I didn't have that in mind. I cannot say because of that.

Q. That was one of the reasons, wasn't it?

A. I cannot say that.

Q. You and the attorneys-in-fact talked about that freezing, didn't you?

A. Oh, yes.

Q. And it would not have done any good to put the money into your father's account because then it would have been frozen, wouldn't it?

A. Oh, I didn't have such ideas as that.

Q. Didn't the attorneys-in-fact tell you. They told you to start a checking account, didn't they?

A. Oh, yes.

Q. They advised you about that, and told you that was the thing to do?

A. Yes. [264]

Q. And instructed you to do it, is that right?

A. Yes.

(Testimony of Kaname Fujino.)

Q. And you know of your own knowledge that one of the reasons that they told you or instructed you to do that was because your father's account was frozen?

A. I cannot say it was because of that.

Q. That was one of the reasons, wasn't it?

A. It could be.

Mr. Beebe: I think the question has already been answered, if your Honor please.

Q. You said it could be? A. Maybe.

Q. Maybe. Wouldn't you say "yes?"

A. As I say, I cannot recall having thought of that. I told you I could not tell you that I thought that was the reason I put it in.

The Court: If the father's account was frozen, how could it have been used in March, 1942?

Mr. Jansen: The government will always allow a license for the payment of taxes, and that was probably withdrawn for the purpose of paying taxes.

The Court: All right.

Q. Why didn't you collect rent before August 22, 1941?

A. Well, the Camp money used to come in. You mean the Oahu Junk? [265]

Q. Yes.

A. I don't know why I didn't demand, but I was busy with my own schooling, and going to school, and as I told you I was not taking an active part in the business at that time, so I had no intentions of demanding the money.

(Testimony of Kaname Fujino.)

Q. You had no intention of demanding the money at all during all the time that you were going to school, did you? A. That's right.

Q. That's right? A. Yes.

Q. And it was only at the suggestion of the attorneys-in-fact that you did finally say "Well, o.k., pay me rent." That's right, isn't it? A. Yes.

Q. The answer is "yes?" A. Yes.

Q. And you had intended to go to school for four years? A. Yes.

Mr. Jansen: I think I might offer this in evidence.

Mr. Beebe: I have no objection to it going into evidence.

The Court: It may become the government's exhibit next in order. Is that an active book? Would you be needing this book?

Witness: No.

The Court: It will be Exhibit Number 6. [266]

(Document offered in evidence and is received and marked: "Defendant's Exhibit No. 6.)

Q. Now, Kaname, I want you to try to remember, if you can, about how much your balance was in the bank on or around March, 1942; just in round figures.

A. I won't know. I would have to go down to the bank and get a bank statement. That is the only way I can say.

(Testimony of Kaname Fujino.)

Q. You haven't paid out very much in there, except that \$500. to Tsutsumi?

A. Yes. I believe around \$2,400.

Q. Around two thousand dollars? A. Yes.

Q. Now when Mr. Beebe was examining you awhile ago, just before lunch, he asked you about this thousand dollars that I had spoken about, that you had paid to your father, and he said, if I remember correctly, you would not give the thousand dollars because you owed it, you would give it to him because he needed it; is that what I am to understand you meant? A. Yes.

Q. Well, as a matter of fact, you did not know when you came back from Japan in May whether you would ever have the thousand dollars as a result of owning this land, did you? A. No.

Q. You didn't know what kind of an income there would be from it, if anything, is that right?

A. Oh, maybe I was thinking what rental income I might [267] have.

Q. But you didn't intend to collect any until after school; when school was out; until after you were through school? A. Beg pardon?

Q. You didn't intend to collect any rent until after you were through with school?

A. You mean after four years?

Q. Yes.

A. No, I did not. I cannot——

Q. Do you understand my question?

A. You say after four years. No, I did not think in that way.

(Testimony of Kaname Fujino.)

Q. You did not think of it in that way?

A. No.

Q. You were not really interested in collecting rent on this land, were you?

A. I would not say that.

Q. Well, Mr. Beebe asked you if you would give your father a thousand dollars. You actually used this land to raise eight thousand dollars for your father, didn't you? A. Yes.

Q. To pay off his income taxes?

A. Yes, I did.

Q. And that was in early 1942?

A. Yes. [268]

Q. Your father had an income tax liability of around eleven thousand dollars? A. Yes.

Q. And you asked the Oahu Junk Company to give you eight thousand dollars? A. Yes.

Q. And the Oahu Junk Company advanced him, your father, three thousand, and between the two of you you paid the eleven thousand dollar tax liability? A. Yes.

Q. And then you said to the Oahu Junk Company: "Well, you can just charge that off to rent, from month to month," is that right?

A. That's right.

Q. So you used this rent to pay off this \$11,000; that is, \$8,000 of it? A. Yes.

Q. Has your father asked you to do that?

A. Well, that time the war was on, so he didn't actually ask me.

(Testimony of Kaname Fujino.)

Q. Had he spoken of it before?

A. About the tax? No.

Q. Did you tell your father that he owed this \$11,000 in taxes; income taxes?

A. I had no way of telling him; the war was on.

Q. But you felt a responsibility to pay it off?

A. I have, yes; that is my father.

Q. And you used the land for that purpose?

A. Not—I signed a note to the Oahu Junk Company, yes.

Q. To the Oahu Junk Company? A. Yes.

Q. And you allowed them to use that, to take it and deduct it in rent? A. Yes.

Q. So you used the land as security with the Oahu Junk Company to raise that \$8,000?

A. Yes.

Q. Now at whose suggestion was that, the attorneys-in-fact? A. Oh, yes.

Q. They suggested that was the best way to handle it? A. Yes.

Q. They said to you: “Your father has this tax liability for \$11,000 and you will have to do something about paying it off?” A. Yes.

Q. In order to keep the books straight, the Oahu Junk Company will loan \$8,000 to you?

A. Yes.

Q. You give the Oahu Junk Company back a note for \$8,000? A. That’s right.

Q. And then the Oahu Junk Company can deduct it from the [270] rent; \$300 a month?

A. Yes.

(Testimony of Kaname Fujino.)

The Court: I am a little confused. I understand he borrowed \$8,000, using land as security for some sort—and that the corporation advanced another \$3,000 and that the total liability was \$11,000?

Q. (By Mr. Jansen): That's right. The land was security to the extent that you used the anticipated rents. You expected to receive \$300 a month?

A. That's right.

Q. In the future, from Oahu Junk?

A. Yes.

Q. You said "I will borrow \$8,000 against that \$300 a month?"

A. Yes.

The Court: From the corporation?

Q. From the corporation, is that right?

A. Yes.

Q. That was all from the suggestion of these attorneys-in-fact?

A. Yes, that's right.

Q. That idea did not originate with you at all?

A. No.

Q. There was a separate item of \$3,000 with the Oahu Junk Company paid to make up the \$11,000. So, actually, all the [271] \$11,000 came out of the treasury of the Oahu Junk. That's right, isn't it?

A. Yes.

Q. Now, Kaname, the power-of-attorney that you signed in Japan runs to Tsuda and Tsutsumi?

The Court: Exhibit "I"?

Mr. Jansen: Exhibit "I," yes.

A. Yes.

Q. That was signed by you in December, 1940?

A. Yes.

(Testimony of Kaname Fujino.)

Q. Have you ever revoked the power—this power-of-attorney? A. No.

Q. The power-of-attorney is still in full force and effect? Is that right? A. Yes.

Q. Now, this cablegram, dated September 22, 1941, is that a cablegram from your company?

A. Yes.

Q. Addressed to the Oahu Junk Company?

A. Yes.

Q. And can you tell us what it says, in English?

A. It says he returned to Japan safely, and to let Kaname know; that is me.

Mr. Beebe: Say it louder if you can, please.

A. I will start all over again. "Returned safely home. Let Kaname know about it. Please give to Tsuneto,"—that is, Mr. Tsutsumi,—There is another Tsutsumi, but that is the one—(int.).

Q. Just give me what is there.

A. "Please give to Tsuneto \$500 as a wedding present. Fujino." Signed "Fujino."

The Court: That is to the Oahu Junk Company, Incorporated?

Witness: Yes.

Q. Now does that say "Tell Kaname to give \$500 as a wedding present," or does it say "Tell Kaname I am home. You give \$500 as a wedding present?"

A. Oh, "Let Kaname know that he returned safely."

Mr. Jansen: Surely.

Witness (Indicating on Document): I believe the sentence would end here.

Q. You mean, "Let Kaname know that I am back in Japan?" A. Yes.

Q. And then the instruction would run to the Oahu Junk Company?

A. Yes, "Give \$500 to Tsumeto." That is the way it reads.

Q. And you carried out the instructing by paying the \$500 out of the money you had in the bank?

A. Yes.

Mr. Jansen: No further recross-examination.

The Court: Re-redirect?

Mr. Beebe: Yes.

(Testimony of Kaname Fujino.)

Q. Well, that still does not answer my question. Is it to the Oahu Junk Company to let you know to pay the \$500, or is that a separate——(int.).

A. It is in between; you can take it either way.

Q. You can take it either way?

A. "Let Kaname know that I returned safely," and then "give to Tsumeto \$500 as a wedding present."

Q. Well, is the constructions, Kaname to give to Tsumeto \$500 as a wedding present?

A. Yes.

Q. Yes, that's right.

Mr. Jansen: I think I will reserve offering the cable itself. [273]

Witness: Can I take a look at it again, Mr. Jansen?

(Testimony of Kaname Fujino.)

Re-redirect Examination

By Mr. Beebe:

Q. Kaname, you have mentioned the fact that \$8,000 was borrowed by you on a note?

A. Yes.

Q. Was there any mortgage given on the land, to the Oahu Junk Company? A. No.

Q. And what was done with that \$8,000, if you know? [274]

A. I paid to my father on my shares,

Q. Wait a minute. What was done with the eight thousand dollars that you mentioned; did you keep it in your pocket, or put it in the bank, or what did you do with it?

A. I must have paid it to my father.

Q. Directing your attention to a bankbook here, on the Bishop National Bank of Hawaii, Yotaro Fujino, the account starting in October, 1941, apparently on the 1st day of October, I will ask you to examine that bankbook and look over the various items there, and then see if it refreshes your recollection as to what was done with the eight thousand dollars?

A. Oh, it was paid to Yotaro Fujino and put in his check account.

Q. In the bank? A. Yes.

Q. Along with some \$3800 more, to make up a deposit of \$11,841.53? A. Yes.

(Testimony of Kaname Fujino.)

Q. So eight thousand dollars of that was what you borrowed from the Oahu Junk Company upon your own, is that correct? A. Yes.

Q. And \$3,841.53 was what the Oahu Junk Company advanced without a note from you, is that correct?

A. They did not advance the rest of that three thousand. [275] I mean I just gave them the eight thousand.

Q. You borrowed the eight thousand dollars?

A. From the Oahu Junk, yes.

Q. On your own, from the Oahu Junk Company?

A. Yes.

Q. And, as I recall, Mr. Jansen said something about \$3800 being advanced by the Oahu Junk Company. Do you know anything about that?

A. No.

Q. And, as I recall—now, prior to your borrowing that eight thousand dollars and depositing it in your father's account for the payment of that obligation, do you know whether any application had been made for "foreign funds," for the purpose of meeting this tax obligation?

A. Yes, I recall hearing something about it, yes.

Q. Do you know what was done; what efforts were made through "foreign funds" to raise the funds necessary to meet this tax obligation?

A. Yes, I recall Tsuda and Tsutsumi working on a license to raise the money. I did not actually go into the details of it.

(Testimony of Kaname Fujino.)

Q. So actually, though, you do not of your own knowledge know what efforts were made prior to your raising this eight thousand dollars, is that correct? A. Yes. [276]

Q. That's right? A. Yes.

Mr. Beebe: At this time, if your Honor please, I would like to offer in evidence this telegram of September 22nd, addressed to Oahu Junk Company, Honolulu, and signed "Fujino."

Mr. Jansen: No objection.

The Court: It may be received as Plaintiff's Exhibit next in order,—Exhibit "O."

(Paper offered in evidence is received and marked: "Plaintiff's Exhibit O.")

[Plaintiff's Exhibit O set out on page 525.]

Q. Do you know whether or not your company had an account in any bank prior to the freeze date?

A. Yes, I think.

Q. In 1941? A. Yes, I think they had.

Q. Now, turning to your Exhibit "O," did I understand you to say that your translation was that after the word "Sirase" that there was a new sentence? A. Yes.

Q. Then your translation is: "Returned safely home. Let Kaname know about it?" A. Yes.

Q. And then a new sentence starts. How does that new sentence start?

A. "Please give five hundred dollars as wedding present to Tsuneto."

(Testimony of Kaname Fujino.)

Q. Is the word "please" there? [277]

A. "Owatasikou," yes.

Q. "Owatasikou" is "please"? A. Yes.

Q. It says "Please give"? A. Yes.

Q. Now when did you agree as to the rental that the Oahu Junk Company was to pay for that property? I am directing my attention to the amount, and to the time you returned here in May of 1941.

A. I would not know. The attorneys-in-fact decided that.

Q. Didn't you have anything to do or say about it? A. Well, I trusted them.

Q. Did you ever talk to them about rental?

A. Yes. I cannot recall rent, but they told me the monthly rental is \$300.

Q. Approximately when was it that they told you that the monthly rental was \$300?

A. I cannot recall. Maybe it was in May, or maybe at the time they gave me the lump sum.

Q. Now did you have any right, or power-of-attorney from either your father or mother to draw on any bank account that they might have had here in the Territory of Hawaii? A. To me?

Q. You? A. No. [278]

Q. You had no power-of-attorney from either your father or mother? A. No.

Q. Had they signed any slip in any bank, so far as you know, authorizing you to draw on any bank account that they may have had here?

A. No.

Mr. Beebe: I think that is all.

(Testimony of Kaname Fujino.)

The Court: Just one point. It may appear to be a little absurd, but we have so many powers-of-attorney floating around here. When he said "attorneys-in-fact decided what the rent should be," does he mean these men acting as his father's attorneys-in-fact or acting as his attorneys-in-fact, or both?

Mr. Beebe: Q. Will you answer that question?

The Court: Do you understand the question?

A. Yes. Well, I cannot say. They just told me the rental is \$300. I just took it as is.

Re-recross-Examination

By Mr. Jansen:

Q. This bank account that Mr. Beebe called attention to, in the Bishop National Bank, do you know of your own knowledge whether the account was actually started in October, 1941, or was it older than that, and it just happened to be in a new book? [279]

The Court: Exhibit 6?

Mr. Jansen: It has no exhibit number.

Q. This Yotaro Fujino bank book.

A. I don't know when it started.

Q. That was an old account in the Bishop Bank, wasn't it? It had been running for years, hadn't it?

A. I cannot recall. I don't know.

Q. Did you make a deposit of \$11,841.53 in June, 1942,—you personally?

A. No, I don't recall.

(Testimony of Kaname Fujino.)

Q. Did you make out a check for \$8,000. from your account in June, 1942? Or, did you just endorse the \$8,000. check over, and then the attorneys-in-fact took it to the bank and put it in your father's account? That must be what you did.

A. I think it is like that.

Q. You looked in your bank book. You put in a deposit for that amount? A. Yes.

Q. You must have just turned the check back to them when you got it? A. Yes.

Q. They took the eight thousand and three thousand down to the Bishop Bank and put it in your father's account, is that right? A. Yes. [280]

Q. Now if I understand you correctly, during all of this time Tsuda and Tsutsumi were your father's attorneys-in-fact? A. Yes.

Q. And are you familiar with the powers-of-attorney that have been offered here in evidence? You have looked at them and read them?

A. Yes, I did read them.

Q. Did you have commercial law here in Hawaii when you went to school? A. No.

Q. Or, do you know——

A. No, I don't know the legal aspects about this.

Q. Do you know that the power-of-attorney that your father gave to Tsuda and Tsutsumi gave them authority to transact all of his business, whether it had to do with lands, or money, or anything else? I mean, you are aware of that? A. Yes.

Q. You are aware, too, that your mother's power-of-attorney was also to Tsuda and Tsutsumi?

A. Yes.

(Testimony of Kaname Fujino.)

Q. And gave them complete authority?

A. Yes.

Q. And your power-of-attorney, which is still in existence, was to Tsuda and Tsutsumi and gave them complete authority? A. Yes. [281]

Q. Even to deed away the land that your father had deeded to you? You knew that? A. Yes.

Q. Yes.

Mr. Jansen: That is all.

The Court: Are you through with the witness now?

Mr. Beebe: Yes, your Honor.

(Witness excused.)

TOKUICHI TSUDA

called as a witness for the plaintiff herein, and being first duly sworn, testified as follows:

Questions by the Court

Q. Will you please state your full name?

A. Tokuichi Tsuda.

Q. And at all times will you talk loud enough so the attorneys can hear you? A. Yes.

Q. How old are you? A. Forty-six.

Q. Where do you live?

A. 903 11th Avenue.

Q. Honolulu? A. Honolulu.

Q. What is your occupation?

A. Manager. [282]

Q. Of what? A. Oahu Junk Company.

(Testimony of Tokuichi Tsuda.)

Q. Are you a citizen of the United States?

A. Yes, I am.

Q. Exclusively? Only? A. Yes.

Q. You are not a dual citizen?

A. I am a dual citizen.

Q. You are a dual citizen, the other country being Japan? A. Yes.

The Court: You may proceed.

Direct Examination

By Mr. Beebe:

Q. Where were you born?

A. I was born in Kona, Hawaii.

Q. Have you lived in the Hawaiian Islands all your life? A. Yes, I have.

Q. How long have you lived in Honolulu?

A. I have lived in Honolulu since I was about fourteen years of age.

Q. And you are now 46,—is that what you have told the Court? A. Yes.

Q. Do you know Kaname Fujino?

A. Yes, I do. [283]

Q. How long have you known him?

A. Oh, about 25 years.

Q. And do you know where he was born?

A. Yes, I do.

Q. Where?

A. Right alongside of the property of the Oahu Junk Company.

Q. Are you employed by the Oahu Junk Company? A. Yes, I am.

(Testimony of Tokuichi Tsuda.)

Q. How long have you been employed by the Oahu Junk Company? A. Since about 1921.

Q. I take it then that you know Yotaro Fujino, the father? A. Yes, I do.

Q. Had you known him prior to the time you went to work for the Oahu Junk Company, or did you become acquainted with him just when you went to work there?

A. Just when I went to work there.

Q. And did you know Chiyono, Kaname's mother? A. Yes.

Q. Now when you first went to work for the Oahu Junk Company can you tell us what sort of an entity it was; whether it was individually owned; whether a partnership-owned, or whether it was a corporation?

A. It was owned by Mr. Fujino and another party by the name [284] of Mr. Honda, doing business under the name of Oahu Junk Company.

Q. When you say Mr. Fujino, I wish you would say whether it is Mr. Kaname Fujino or Mr. Yotaro Fujino? A. Yotaro Fujino.

Q. Was it originally started as a partnership of Yotaro Fujino and someone else,—is that right?

A. Yes.

Q. And was there a change later from the co-partnership?

A. Yes, the other person, he withdrew from the partnership.

Q. Approximately when was that?

A. Oh, about two years after I worked there.

(Testimony of Tokuichi Tsuda.)

Q. When,—what year, did you start to work there? A. 1921.

Q. So it was about '23? A. About 1923.

Q. When the other partner withdrew?

A. Yes.

Q. And from then on was it continued by Yotaro Fujino, doing business as Oahu Junk Company?

A. Yes.

Q. Now was there a change after that time in the set-up?

A. Yes; he incorporated the business in November, 1940.

Q. And where was Mr. Fujino at that time,—Yotaro Fujino? [285] A. He was in Japan.

Q. And where was Chiyono Fujino at that time?

A. She was also in Japan.

Q. When, if you know, did Yotaro Fujino and Chiyono go to Japan?

A. They left the Territory in February, 1935.

Q. Did either one of them ever return after that time? A. Yes, Mr. Fujino did.

Q. Approximately when did he return, Mr. Tsuda?

A. He returned sometime in September of the same year,—1935.

Q. And remained how long, if you know?

A. Oh, about a month.

Q. Then with the exception of that one visit of Yotaro Fujino had he been in the Territory at all since 1935, when he left here?

A. No, he had not.

(Testimony of Tokuichi Tsuda.)

Q. Would that same be true of Chiyono Fujino?

A. Yes.

Q. She never did come back to the Territory, is that correct?

A. She never did.

Q. How about Kaname; did he leave the Territory at any time?

A. Yes, I think he left when he was,—Childhood. [286]

Q. Did he later leave, in 1934 or 1935?

A. Yes, he left in 1934.

Q. When did he return to the Territory?

A. In May, 1941.

Q. Now who was in charge of the business, the Oahu Junk Company, from the time Yotaro left the Territory up to the time, we will say, Kaname returned, in 1941?

A. Tsutsumi and myself.

Q. Did you ever, or were you acting under any powers-of-attorney given you by either Yotaro Fujino or Chiyono Fujino during that period of time?

A. Yes.

Q. When were these powers-of-attorney given you, if you recall?

A. The first power-of-attorney was given us in February, 1935.

Q. By both of the Fujinos; that is, Yotaro Fujino and Chiyono Fujino?

A. Yes.

Q. Directing your attention to three powers-of-attorney already in evidence, being Exhibits A, B, and C, are those the powers-of-attorney under which you acted during that period of time.

A. Yes.

(Testimony of Tokuichi Tsuda.)

Q. And you are the Tokuichi Tsuda referred to in all three [287] of those powers-of-attorney, are you? A. Yes.

Q. Now I notice one of these powers runs from "Yootaro" Fujino, and another one runs from "Yotaro" Fujino. Can you enlighten us upon that difference in the spelling in the first name?

Is there any reason you know of that there was a difference in the spelling of the first name on the two powers? That is, where one of them is spelled "Y-o-o-t-a-r-o" and the other one is spelled "Y-o-t-a-r-o"?

A. He had one of the property under the title of "Y-o-t-a-r-o" Fujino, with the "Yotaro" spelled with one "o" and on the other property with the "Yotaro" spelled with two "o's", so he wanted them to run both ways, because of the difference.

Q. So he wanted them to run both ways because of the difference there in the spelling of the name in the deeds to the various properties, is that correct? A. That's right.

Q. Now at the time of the incorporation of the Oahu Junk Company, in December of 1940,—Was it December or November, 1940?

A. November, 1940.

Q. Who, if an attorney did act, acted as attorney in the drafting of the papers, and so forth? [288]

A. Mr. Robert Murakami.

Q. He has been on the witness-stand here?

A. Yes.

Q. And do you know, or did you know, a person by the name of Seitaro Yamamoto? A. Yes.

(Testimony of Tokuichi Tsuda.)

Q. Who was Seitaro Yamamoto?

A. Seitaro Yamamoto has been advisor and secretary to Yotaro Fujino.

Q. Was that prior to the time the Fujino's, Yotaro and Chiyono, went to Japan? A. Yes.

Q. Was he an employee of the Oahu Junk Company in 1935 and prior thereto? A. Yes.

Q. And subsequent to the time that the Fujinos went to Japan, what status, if any, did Seitaro Yamamoto occupy with the Oahu Junk Company, after the old gentleman and the mother went to Japan?

A. He was in an advisory capacity.

Q. Did he work down at the Oahu Junk Company after 1935, when the old folks went away?

A. Yes, he did.

Q. And he was paid a salary? A. Yes.

Q. And how long did he continue in the capacity that you [289] have mentioned?

A. Until his death in 1941, August.

Q. Did he have a desk down there, and so forth?

A. Yes, he had a little table.

Q. And was there any correspondence that was carried on between the Oahu Junk Company and the Fujinos in Japan after 1935, when the old man finally went away for good?

A. Yes, there was.

Q. Who acted as correspondent for the Oahu Junk Company? A. He did.

Q. That is, who answered the letters, if any were received, from the Fujinos, Yotaro and Chiyono?

A. Seitaro Yamamoto did all the answering, the writing.

(Testimony of Tokuichi Tsuda.)

Q. Were letters received from the old man in Japan from time to time, about business and so forth? A. That's right.

Q. Now why was it that Seitaro Yamamoto carried on the correspondence, at least so far as the Junk Company was concerned?

A. Because I would not know how to read or write. Of course I would not say that I did not know nothing at all, but I would not know to the extent to understand what was contained in a letter that was received, or I would not be able to answer the letter.

Q. Does that mean that you do not write Japanese well [290] enough to express yourself and the information that you wanted on the business carried back to the old gentleman in Japan?

A. That 's right.

Q. Was Yamamoto foreign-born? A. Yes.

Q. Born in Japan? A. Yes.

Q. And how about his English? Could he read and write English?

A. Well, he spoke pretty good.

Q. Could he write in English?

A. Yes, he did.

Q. Did he write Japanese well and fluently?

A. Yes, he did.

Q. And was that the reason that the correspondence was turned over to him as secretary?

A. That's right.

(Testimony of Tokuichi Tsuda.)

Q. Now how about the other person named as attorney-in-fact, Tsutsumi. Did he have any facility in writing Japanese?

A. I don't know. I guess he was just as bad as I was.

Q. How long, if you know, did Seitaro Yamamoto work for the Oahu Junk Company?

A. Sometime about 1925.

Q. I see. Then he went to work for the old gentleman after you started work, is that right? [291]

A. Yes.

Q. Had he been in the junk business prior to the time that he went to work for Yotaro Fujino in the Oahu Junk Company?

A. Yes, he was connected with the Honolulu Junk Company.

Q. Now the additional power, or a new power-of-attorney was given to you, was it not, in the year 1941, by Yotaro Fujino? A. What?

Q. A new power-of-attorney was given you on the 20th of February, 1941, was it not, by Yotaro, also known as Yootaro, Fujino? A. Yes.

Q. Being Exhibit "E," and one also given on the 23d of December, 1940, by Chiyono, being Exhibit F? A. Yes.

Q. Now why was it thought necessary to get new powers-of-attorney from the Fujinos at that time; can you tell us?

A. When the property was to be deeded over to Kaname I went to the Bishop National Bank and told them of this deed to be transferred over to

(Testimony of Tokuichi Tsuda.)

Kaname Fujino, and it was then that they had suggested drawing up a new powers of attorney.

Q. Now you said when the property was to be deeded over to Kaname you went to the bank?

A. Yes. [292]

Q. Where did you get any instructions, if you got any, that the property was to be deeded over to Kaname?

A. That instructions came sometime before November, 1940, from Yotaro Fujino, through Seitaro Yamamoto.

Q. How did it come?

A. It was sometime before 1940 when we were asked by Seitaro Yamamoto that he wanted to see Yasuo Tsutsumi and myself, and so we went up to his home, and he told us that he was in receipt of a letter stating that Yotaro Fujino wanted to proceed with the incorporation and that he would give the property to Kaname.

Q. Now approximately when was that?

A. Sometime before November, 1940.

Q. Sometime between November, 1940?

A. Sometime before November, 1940.

Q. Before November, 1940. Well, was it in the year 1940?

A. Yes, if I remember correctly it was sometime between July, 1940, and November, 1940.

Q. Do you know whether or not Robert Murakami went to Japan in the year 1940?

A. Yes, I knew.

United States
Circuit Court of Appeals
For the Ninth Circuit.

KANAME FUJINO,

Appellant,

VS.

TOM C. CLARK, Attorney General of the United
States,

Appellee.

Transcript of Record
In Two Volumes
VOLUME II
Pages 265 to 533

Upon Appeal from the District Court of the United States
for the Territory of Hawaii

FILED

APR 7 1948

PAUL P. O'BRIEN,
CLERK

No. 11786

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(Testimony of Tokuichi Tsuda.)

Q. Do you remember approximately when he went there, and approximately when he returned from Japan?

A. I don't know the exact time, but it was sometime in March, I remember. [293]

Q. That he went to Japan, or returned?

A. That he left the Territory.

Q. Do you know approximately when he returned? A. Sometime in July.

Q. Now was it after Robert Murakami returned to the Territory that the matter of incorporation started to go ahead? A. That's right.

Q. And was it after that time when you received the instructions from Yamamoto or word from Yamamoto that the real property was to be transferred to Kaname?

A. It may have been after Mr. Murakami came back.

Q. Now at the time you were advised by Seitaro Yamamoto that the property was to be transferred, was any letter, telegram or anything else shown you by Yamamoto?

A. To my recollection, if I remember correctly, I think Mr. Yamamoto must have read the letter before Tsutsumi and myself.

Q. Have you any recollection of seeing the letter?

A. He had some correspondence before him.

Q. Did you look at it?

A. I didn't look into it.

Q. What is that?

A. I did not look into the letter.

(Testimony of Tokuichi Tsuda.)

Q. Could you see the letter?

A. Yes, I could.

Q. Could you see in whose handwriting it was?

A. Yes, that I was positive.

Q. In whose handwriting was it, if you know?

A. It must have been Yotaro Fujino's handwriting.

Q. Now this took place, as you say, in Seitaro Yamamoto's home? A. That's right.

Q. Not in the office? A. No.

Q. And he had that letter at his home, is that correct? A. Yes.

Q. Then after receiving his advice was when the powers-of-attorney were drawn, is that correct?

A. Yes.

Q. Have you ever seen that letter after that date?

A. No, I don't remember. I don't remember.

Q. Well, can you tell the Court anything about the habits of Yamamoto as to correspondence, whether he kept it all in the office, or whether he kept it all at home, or whether he had it in both places, if you know?

A. Well, Yamamoto, Seitaro Yamamoto, had not been around the store very much. He maybe came once a week, and probably would not be around for about two weeks, so, average, he may have showed around the store maybe about three or four times a month, and he has been home most of the time. [295]

(Testimony of Tokuichi Tsuda.)

Q. Over how long a period of time would you say that that conduct carried on?

A. Oh, I would say he has been that way since, oh, maybe while Mr. Fujino, Yotaro Fujino, was still in the Territory.

Q. He was one of these off-and-on workmen, is that it? A. That's right.

The Court: I am not sure from this man's testimony whether he is recalling that maybe Mr. Yamamoto had a letter from Mr. Yotaro Fujino which he read,—a letter this man actually saw and can tell us definitely that it was a letter from Yotaro Fujino, or whether he is recalling that, as I say, or actually saw it. I don't get it in my mind that he actually saw the letter.

Q. Well, will you answer that question. Did you actually see the letter on that occasion?

A. Yes, we sat opposite one another and he had some correspondence open before him, because I was near his table and looked into the table, and I was not sitting away from the table, and he was just telling what Fujino wanted him.

Q. Did he purport to read the letter to you?

A. Beg pardon.

Q. Did he purport to read the letter to you? That is, did he look down and read from the letter?

A. Yes, he was reading some part of the letter; told us what Fujino wanted. [296]

Q. Did he look at the letter, or what he was reading from, so that you could tell from the handwriting the person who had written it?

(Testimony of Tokuichi Tsuda.)

A. Well, from my observation, I would not make sure, but then I think it was Yotaro's,—Yotaro Fujino's writing.

Q. And relying upon that and upon the advice from the bank you sent the forms of powers-of-attorney on to Japan, did you?

A. Yes, that's right.

Q. Did you do that, or Seitaro Yamamoto address the correspondence and forward the various attorneys on to Japan?

A. Seitaro Yamamoto did that.

Q. And upon the return of those powers-of-attorney did you execute the deed; that is, you and your co-attorney-in-fact, Mr. Tsutsumi,—execute the deed that has been introduced here in evidence as Exhibit "H"? A. That's right.

The Court: That is the deed of the land owned by Yotaro Fujino to his son Kaname?

A. Yes.

Q. The deed I have just referred to is shown in the record as Plaintiff's Exhibit "H"? Is the signature there, Tokuichi Tsuda, your signature?

A. Yes, that's right.

Q. And in both places, both under Yotaro Fujino and [297] Chiyono Fujino? A. That's right.

Q. Now there has been introduced in evidence a mortgage from Yotaro Fujino,—Yotaro Fujino, also known as Yootaro Fujino, and Chiyono, to the Bishop National Bank of Hawaii, at Honolulu; the mortgage covering the property involved in Exhibit "H", the consideration being fifteen thousand dol-

(Testimony of Tokuichi Tsuda.)

lars. Will you tell the Court the reason for the giving of that mortgage of fifteen thousand dollars to the Bishop National Bank of Hawaii at Honolulu.

A. Yes, when the corporation took over the assets of Yotaro Fujino there was a mortgage on the property in the sum of fifteen hundred dollars, and there was also an unsecured note owing the bank for eighteen thousand five hundred dollars, and so since the corporation has taken all the liabilities the Bank wanted some more security to secure those liabilities that the corporation has assumed from Fujino, so they suggested in mortgaging the property to secure those unsecured loans.

Q. I see. This was an unsecured obligation owing by the old gentleman? A. Yes.

Q. And after that mortgage was given then the conveyance was later made to Kaname, is that right?

A. Yes. [298]

Q. Do you know whether Kaname ever endorsed that note for fifteen thousand dollars given to the bank at that time?

A. Yes, I recollect after the deed was signed I taken the deed down to the bank and to show them whether everything was in order, and they were satisfied with the deed, and they asked me at the time when Kaname was going to return, so I told them he must be back almost any moment, and suggested I leave the deed there until he returned, because they thought they would like to have him endorse the note.

(Testimony of Tokuichi Tsuda.)

Q. Then who recorded or registered that deed, do you know? A. Beg pardon?

Q. The deed, Exhibit H, who took it up to the record office or Registry of Conveyances? Did you or did someone else, if you know?

A. No, Kaname himself took it up.

Q. Now at the time of the incorporation was any stock issued to Kaname?

A. No, not at the time of the incorporation.

Q. Later was there stock issued to Kaname?

A. Yes.

Q. And was stock also later issued to his two sisters? A. Yes, that's right.

Q. Do you remember the number of shares that were issued to Kaname?

A. Yes, that's right; 200 shares to Kaname.

Q. How many to the girls, just approximately?

A. 117 each.

Q. 117 each? A. Yes.

Q. Was stock also issued to the old gentleman, Yotaro, and also to Chiyono?

A. That's right.

Q. Are you a stockholder? A. Yes.

Q. And was stock issued to you at about the same time?

A. At the time of the incorporation.

Q. Now was that stock paid for by Kaname, and the two girls, or what was done?

A. A note was taken for the stock issued to the children.

(Testimony of Tokuichi Tsuda.)

Q. A note was taken from all the children?

A. No, from Kaname, and yes, the note was taken from the two daughters.

Q. Do you remember the original amount of the note from Kaname?

A. About twenty thousand dollars.

Q. And from the girls?

A. Eleven thousand seven hundred dollars each.

Q. Who executed these notes? That is, who signed them?

A. The daughters signed their own notes, and a power-of-attorney, and the attorney-in-fact executed Kaname's note. [300]

Q. That is, you and Mr. Tsutsumi executed the twenty thousand dollar note, as attorneys-in-fact for Kaname, is that correct? A. Yes.

Q. Why was that done, or tell the Court the reason for the execution of that note, if you know?

A. We were advised by Seitaro Yamamoto, who told us that is the way Yotaro Fujino wanted, because he wanted to maintain the parental control for awhile, I guess.

Q. You say he wanted to maintain parental control for awhile? A. Yes.

The Court: These notes ran to the father, or to the corporation? A. To the father.

The Court: We will take a short recess.

(Recess.)

(Testimony of Tokuichi Tsuda.)

Q. (By Mr. Beebe): Mr. Tsuda, after Yotaro Fujino returned to Japan in 1934 or 1935 did he draw any salary from the Oahu Junk Company?

A. No, I don't remember drawing any salary.

Q. Well, did you send him any money, we will say between 1935, when he went to Japan, and 1939?

A. No, I don't remember sending any money.

Q. Well, we have been talking about salaries now. Were any moneys sent to him as earnings from Oahu Junk Company? [301]

A. No.

Q. You sent no funds as earnings from Oahu Junk Company to him in Japan?

A. That's right.

Q. Is that correct? A. Yes.

Q. And you sent no moneys representing salaries to him in Japan? A. No.

Q. Well, was he supposed to draw any salary?

A. No, nothing was decided on that, or was said about it.

Q. Did you deposit anything either as salary or as earnings by Oahu Junk Company to his account in any bank here in Honolulu? A. No.

Q. Do you know how he lived?

A. I don't know.

Q. Now after 1938 or 1939 did he receive any funds of any kind that you know of? A. No.

Q. Well, any shipments made from here to Japan, we will say of rubber or anything of that kind? Did he at any time, so far as you know, retain any of the moneys representing the purchase price of that material after it landed in Japan?

(Testimony of Tokuichi Tsuda.)

A. Well, there was some occasion when the shipment went [302] and he has collected the money on the other end, and we have not received the money.

Q. Well, on the other hand, during that period, were you importing—and I mean by you, the Oahu Junk Company, any cement from Japan to the Territory of Hawaii? A. That's right.

Q. Now were there any of those shipments that you did not pay for here?

A. Yes, there are a few shipments I think were taken care of up in Japan.

Q. Taken care of by whom, if you know?

A. By Yotaro Fujino.

Q. Can you give us any idea of the number of shipments originating here for Japan in which you did not receive the money, and the amount, if you know, representing the invoices?

A. I think there was a pretty large shipment of scrap iron that was made to Japan in 1938 or 1939, probably—I don't remember what year, and that was quite a sum of money involved. I think probably it would run, probably, around thirty-five thousand dollars, or so.

Q. Any other shipments originating here?

A. No, that is the only fixed or biggest amount that I could remember.

Q. Were there any shipments where the amount involved was one thousand or two thousand or five thousand dollars? [303]

A. There may be.

(Testimony of Tokuichi Tsuda.)

Q. Can you give us any idea of the number of shipments originating here, going to Japan, where you did not get the money here in Honolulu?

A. Well, one of them was a large shipment, and probably there was another one or two small shipments that involved probably around two or three thousand dollars, each shipment.

Q. So altogether it would be about forty-one thousand dollars?

A. Roughly, around forty or forty-one—rough figures.

Q. I appreciate that. And the other situation was the shipments of cement, or so forth, originating in Japan and destined for here, where you were not called upon to pay the original invoices?

A. That's right.

Q. How many shipments were there, if you can recall?

A. Oh, maybe two or more—about three or four shipments.

Q. Can you give us the amount of money involved in those shipments that were taken care of in Japan and not paid for by the Oahu Junk Company here?

A. I think that would not run more than five thousand dollars. That is what I think.

Q. It would not run more than five thousand dollars? A. Yes.

Q. Now with reference to the time, when were those cement [304] shipments made upon which payments were apparently taken care of in Japan?

(Testimony of Tokuichi Tsuda.)

A. After the shipments were made to Japan, and after the money was collected in Japan by Yotaro Fujino.

Q. Then you would say that he collected practically forty-one thousand dollars on shipments originating here and going to Japan, and had paid approximately five thousand dollars on merchandise coming from Japan to the Oahu Junk Company here, is that about it?

A. Yes, approximately.

Q. And that was either in 1938 or after that time?

A. Yes. It must be around about 1938 or 1939.

Q. I see. Prior to that time you know of no money that he got either from the Oahu Junk Company or from any source, is that correct?

A. No, no money was given.

Q. Now, after 1939 was any money sent him, either as salary, as dividends or anything else, other than this amount of money that you have referred to?

A. No, no money was sent.

Q. Now there has been testimony in the record here, Mr. Tsuda, about a tax liability of Yotaro Fujino's amounting to some \$11,800, as I recall. Do you know about that?

A. Yes, I do.

Q. That was an income tax for prior years, was it? [305]

A. Yes, that is additional income tax.

Q. Additional income tax? A. Yes.

Q. And for what years?

A. For the year 1940, I am quite sure.

(Testimony of Tokuichi Tsuda.)

Q. Now was any effort made to raise that \$11,000 other than by borrowing from the Oahu Junk Company. A. Yes.

Q. Will you tell the Court.

A. Mr. Fujino did not have any funds to meet that obligation, so we made application to the Foreign Funds Control to permit the attorney-in-fact to surrender 110 shares of Yotaro Fujino, which was at the par of \$100 each, in order to pay the income tax, and which was figured \$100 par, on 110 shares, which will raise the sum of about eleven thousand dollars.

Q. Surrender it to who?

A. To the corporation; treasury stock.

Q. And the ultimate effect of that would have been that 110 shares of stock would have gone back to the corporation as treasury stock? A. Yes.

Q. And the corporation would have given the eleven thousand dollars, is that correct?

A. Yes.

Q. I take it you were unsuccessful in getting that through [306] Foreign Funds, is that correct?

A. That was denied.

Q. All right. Then how was the money actually raised?

A. Well, we were up against it so we went—Tsutsumi and I, went up to Mr. Murakami's office to discuss how and what was the best procedure to take, and so after discussion we arrived to make application—We arrived to the point where we would make another application to the Foreign Funds Control requesting that the corporation will

(Testimony of Tokuichi Tsuda.)

advance or loan Kaname eight thousand dollars, and that he would in turn apply his monthly rental towards that advance the corporation would make him. And Yotaro Fujino had a banking account with the Yokohama Specie Bank, under the name—his deposit was under the name of Oahu Junk Company, and Oahu Lumber & Hardware Company—he had two accounts there, the two accounts totalling the sum of about thirty-eight hundred dollars, so we wrote all the details in the application, and that the corporation would advance the money with the understanding that Fujino will pay back from that savings he had with the Yokohama Specie Bank.

Q. Then in its final analysis, you loaned eight thousand dollars to Kaname? A. Yes.

Q. Taking his note back? A. Yes. [307]

Q. Where did that other thirty-eight hundred dollars come from?

A. The other thirty-eight hundred dollars was also advanced by the corporation, and after the money was in from the Yokohama Specie Bank that was returned to the corporation.

Q. I see. Did Kaname execute a mortgage in addition to his note, to the corporation, covering the property, or just give his note?

A. Just give a note.

Q. Now you mentioned the \$300 a month rental. When was that rental set; that \$300 a month?

A. That was sometime right after Kaname got back to the Territory. I think we had a discussion between Kaname and Tsutsumi and myself; it may

(Testimony of Tokuichi Tsuda.)

have been probably in May, probably in the early part of June; I cannot remember, but it must be not very long after Kaname got back to the Territory.

Q. And the result of that discussion was what?

A. The result of the discussion was that, that we agreed that the corporation will pay \$300 a month.

Q. Who was to pay the taxes, and so forth?

A. Well, the point really not come up, and on account of the rental being somewhat cheap, comparing from other places, I think the executive committee has agreed to have the corporation pay the taxes.

Q. How about the repairs and so forth? [308]

A. Yes, the repairs and all that.

Q. The corporation paid the repairs?

A. Yes; anything, all that the corporation was renting.

Q. So Kaname was to get \$300 a month net, in fact, is that correct? A. Yes.

Q. Now why weren't the payments made until, as I recall the record shows, sometime in August?

A. Well, I guess on account of the financial part of the corporation. The problem of money. They did not—Of course they had sufficient money to pay, but we thought of using money for the corporation, because it was not any hurry in paying the rent, because there was no demand or anything made.

(Testimony of Tokuichi Tsuda.)

Q. Then have you continued to pay—I mean, the corporation, continued to pay the rental of \$300 a month for the property? From, we will say, January, 1941?

A. Yes, I am sure the rent was paid from January, 1941.

Q. To whom first; to Kaname first?

A. Yes, I believe the check was made up to Kaname.

Q. Has there been any change in the payments? Have payments been made to anyone other than Kaname, we will say since the war?

A. Yes, the payments had been made—has now been made, to the Office of the Alien Property Custodian. [309]

Q. How long has it been since payments have been made to the Alien Property Custodian?

A. Right after the vesting order was received.

Q. And that payment has been how much a month?

A. Three hundred dollars a month.

Q. When Kaname borrowed this eight thousand dollars from the Oahu Junk Company to pay on account of his father's obligation, what was done with the \$300 a month that Kaname was paying back by way of rental?

A. That was applied to his loan from the corporation.

Q. And was any credit made to Kaname's twenty thousand dollar note?

A. I think that the lump sum of eight thousand dollars was applied toward the twenty thousand dollar note.

(Testimony of Tokuichi Tsuda.)

Mr. Beebe: I see. I think that is all.

The Court: I don't get that last. The lump sum of eight thousand dollars loaned to the plaintiff, against which the rentals were to be used to pay them off, was credited against the twenty thousand dollar note for stock?

Mr. Beebe: The twenty thousand dollar note that Kaname owed to his father.

The Court: Oh, that's right.

Mr. Beebe: Does your Honor understand my position?

The Court: I don't quite get that credit. \$300 came in, and it tended to cancel the \$8,000 loan to the corporation. [301] Take me the next step.

Mr. Beebe: And the eight thousand to his father. He had, in effect, paid the \$8,000 his father owed the government.

The Court: So he got the \$8,000 credit on his twenty thousand?

Mr. Beebe: On his twenty thousand.

Q. (By Mr. Beebe): Is that correct, Mr. Tsuda? A. Yes.

Cross-Examination

By Mr. Jansen:

Q. You are familiar with promissory notes?

A. Yes.

Q. And when payments are made on promissory notes is it your practice, your custom, to endorse the payment on the back?

A. No, not necessarily.

(Testimony of Tokuichi Tsuda.)

Q. Isn't that the usual way?

A. No. We would sometimes give a receipt. That is if the note was paid in full, maybe, but we would customarily give a receipt.

Q. Did you give Kaname a receipt for eight thousand dollars?

A. I probably did, yes.

Q. Did you endorse the eight thousand dollars on the note?

A. That I don't remember. [311]

Q. Will you produce a copy of the receipt? What kind of a receipt did you give him?

A. Just an ordinary receipt. If I had given him—and signed by Yotaro Fujino.

Q. Are you sure now that you gave him a receipt?

A. Why that is from my memory. I am not quite sure. I would have to look into the record to see if there is a receipt given.

Q. You don't know whether you gave him a receipt or not, do you?

A. Right off-hand, I don't know.

Q. Isn't it customary when a part-payment is made on the note to endorse the payment on the back of the note, or some place on the note?

A. I haven't done that.

Q. Well, let's see how the bank does it. You are familiar with that, aren't you?

A. Yes.

Q. And this Exhibit "K" is the original note that you signed on the fifteen thousand dollar mortgage, isn't it?

A. Right.

Q. And as each payment is made on the note it is endorsed right on the original note, isn't it?

A. Yes.

(Testimony of Tokuichi Tsuda.)

Q. And you know that to be the practice? [312]

A. Yes.

Q. You didn't do that on Kaname's note for twenty thousand dollars?

A. No, we didn't do that.

Q. And you are not sure whether you gave him a receipt? A. Yes, I am not sure.

Q. If you had given him a receipt would you have given it to him out of a receipt book such as you had around the office?

A. Sure, if we had given a receipt we would just tear the receipt blank from the receipt book and would have given to him.

Q. Would you make a credit on the receipt?

A. On the corporation receipt book? Yes, we have to keep. We have a copy.

Q. And are these receipts in a book so they are right in order? A. Yes, they are.

Q. Will you look for it: this evening will you look and see if you can find a copy of the receipt.

A. Oh, his receipt would not be in a corporation book.

Q. Where would you get the receipt from?

A. Oh, we had some blank receipt books there that is not connected with the corporation records, and if I had given him it would be just torn out from the blank, of that receipt [313] book, and just giving it.

Q. Why didn't you endorse the eight thousand on the note?

A. Well, we thought it wasn't necessary.

(Testimony of Tokuichi Tsuda.)

Q. Isn't it the usual thing to do?

A. Customary—the bank does all that, yes.

Q. But you didn't do it?

A. No; we didn't do it.

Q. You thought it was not necessary?

A. Yes, that's right.

Q. Now you have been working for Yotaro Fujino for 24—twenty some odd years; over 23, did you say?

A. Twenty-one.

Q. Over 21, and Mr. Tsutsumi has also been working during that period of time for Yotaro?

A. No, I think he has been there about 17 or 18 years.

Q. 17 or 18 years?

A. Yes.

Q. And that would be from what year, 1926, maybe?

A. Maybe about 1927.

Q. 1926 or 1927?

A. Yes.

Q. And Yamamoto had been with the Honolulu Junk Company, and came over to work for Yotaro after you started working for Yotaro?

A. That's right. [314]

Q. Was it after Tsutsumi started working for Yotaro that Yamamoto came over?

A. No, before Tsutsumi came.

Q. Now do you know of your own knowledge whether or not Yamamoto has worked for Yotaro at all before 1925 or 1926?

A. No, they have known each other quite a bit, but I believe he has not worked for Yotaro prior to 1925 or 1926.

(Testimony of Tokuichi Tsuda.)

Q. How old was Yamamoto when he died in 1941?

A. That I would not be able to remember. I know he was about two years older than Yotaro Fujino.

Q. And Yotaro Fujino in 1941 was around 55?

A. Fifty-five or seven; yes, I believe so.

Q. And that would be about right?

A. Yes.

Q. The reason that Yamamoto wrote the letters, as I understand it, is because he could write better Japanese than either you or Tsutsumi?

A. Yes, that's right.

Q. You had been working for Yotaro longer than Yamamoto? A. That's right.

Q. And Tsutsumi had been working for Yotaro almost as long as Yamamoto?

A. That's right.

Q. And Yotaro had selected you and Tsutsumi as attorneys-in-fact when he left for Japan? [315]

A. That's right.

Q. Rather than Yamamoto?

A. That's right.

Q. So the only reason that the correspondence was handled by Yamamoto was because he knew more about the written Japanese than you and Tsutsumi? A. That's right.

Q. And he did not hold any stronger position in the affections or respect or confidence of Yotaro than you or Tsutsumi, did he?

A. Well, in the sense that if he gave us the power-of-attorney it seems that way.

(Testimony of Tokuichi Tsuda.)

Q. It seems that you hold more confidence and more respect in Yotaro's mind, huh?

A. That's right.

Q. And from 1935—By the way, did Kaname go to Japan to go to school before Yotaro left for Japan?

A. That's right. He left about a year before Yotaro.

Q. A year before? A. Yes.

Q. Do you know where he stayed in Japan until his father and mother came there? A. No.

Q. But he left a year before his father and mother? A. That's right. [316]

Q. And then in 1935 Yotaro and Chiyono went to Japan, too? A. That's right.

Q. And before they left they gave you and Tsutsumi powers-of-attorney?

A. That's right.

Q. Which authorized you to handle all of their business affairs; all of their transactions here in Hawaii? A. That's right.

Q. In connection with the Oahu Junk Company?

A. That's right.

Q. In connection with any property they own?

A. Yes.

Q. And any bank account; everything?

A. Yes.

Q. And the letters that were written were really written from Yotaro to the Oahu Junk Company when he would write from Japan, after he left, were they not?

(Testimony of Tokuichi Tsuda.)

A. Well, anything that would pertain to the business would be written to the Oahu Junk Company.

Q. Yes, everything that pertained to the business, even, for example, the letter in regard to the incorporation, would be written to the Oahu Junk Company?

A. Well, I recall that all letters pertaining to Mr. Yotaro Fujino's personal matters, most of the letters were addressed to Saitaro Yamamoto, care of the Oahu Junk Company. [317]

Q. Care of the Oahu Junk Company?

A. Yes.

Q. In every case they would come to the office of the Oahu Junk Company? A. Yes.

Q. Whether they had to do with his personal matters, or whether they had to do with business matters, they would all come to the Oahu Junk Company's office?

A. As far as I seen the letters that came to the Oahu Junk Company was in that order.

Q. All that Yamamoto would do in regard to the business would be to tell you what was in the letters from Yotaro? A. Yes, that's right.

Q. And during 1935, through 1936 and 1937, and 1938 and 1939, Yotaro would give you instructions about what to do about this and what to do about that, from time to time, during those years would he not?

The Court: Yotaro would give who instructions?

(Testimony of Tokuichi Tsuda.)

Mr. Jansen: Give him instructions in letters.

The Court: Give Yamamoto?

Mr. Jansen: No, give the attorneys-in-fact.

Q. I mean, he would send his instructions in letters? Let's say it that way. A. Yes.

Q. And those instructions with regard to the business [318] were directed to you and to Tsutsumi? A. That's right.

Q. But Yamamoto would read the letters for you? A. Yes.

Q. So you would be sure you got them right?

A. Yes.

Q. And then if you had any questions to ask with regard to what you ought to do in the business you would ask Yamamoto to write the letter, so that you would be sure that the questions would go through to Yotaro properly? A. Yes.

Q. He was sort of a correspondence secretary for the Oahu Junk Company?

A. That's right.

Q. But on matters of judgment, matters of discretion, in the handling of the business, when you didn't have a chance to obtain advice or the instructions of Yotaro, you and Tsutsumi would exercise the discretion; would exercise the judgment, would you not?

A. Yes, on these things that we were sure of that exercise.

Q. And if you were not sure you would write to Yotaro? A. We would consult Yamamoto.

Q. And he would write to Yotaro?

A. If he could arrive at a decision we would take his [319] discretion.

(Testimony of Tokuichi Tsuda.)

Q. But if he could not arrive at a decision he would write to Yotaro? A. Yes.

Q. And a decision would come back?

A. That's right.

Q. Now when Yotaro left in 1935, of course he owned all the business; you and Tsutsumi and Yamamoto had no ownership at all in the business?

A. That's right.

Q. So whatever you were doing you were doing for Yotaro? A. That's right.

Q. And you—you would, of course, follow his instructions; his directions, his advice, with regard to all matters about the business?

A. Not all; all matters of the business.

Q. What?

A. Not to all matters of the business. In the general routine of the business, and which was daily routine, buying and selling, and things like that, in the ordinary way, Tsutsumi and I used to handle the business.

Q. Before he left he said "You boys know how to do it." You have been with him for a long time, "You go ahead with the routine. You are working for me, anyhow"? A. Yes. [320]

Q. But on matters of discretion or judgment you would maybe consult with him or consult with Yamamoto, and he would write to Yotaro?

A. That's right.

Q. So, during that time you would shift, I suppose,—you did business in the junk business and had this hardware and lumber business, too, and

(Testimony of Tokuichi Tsuda.)

you also took in the money that you would collect in the various businesses that you handled there, and pay the bills, and what would you do with what was left over, the profits?

A. The profits was put in reserve of the company.

Q. In reserves? A. That's right.

Q. And from time to time you would send shipments of junk to Japan and Yotaro himself would perhaps collect the money?

A. Not from the time,—only about two or three occasions he did collect.

Q. Two or three? A. Yes.

Q. When he left for Japan did he have quite a bit of money with him?

A. No, I remember give him only \$300 in cash, after the steamer fares and everything was paid.

Q. Did he have other money?

A. I don't know. [321]

Q. How soon after he left for Japan did he collect on the shipments that were made there?

A. I think he collected on the shipments that were made there in 1938 or 1939.

Q. Didn't you send him some money between 1935 and 1938 to 1939?

A. No, I don't remember. I am positive we did not send him money.

Q. Do you have any idea what he used to live on?

A. I don't know.

Q. Do you know how he bought this house he had in Japan? A. No.

(Testimony of Tokuichi Tsuda.)

Q. Had he had an income from the business during the years before he left for Japan; did he collect money from the business?

A. From the Oahu Junk Company?

Q. Yes.

A. Well, he used to take whatever sum he wanted. He didn't draw any salary; he just took what he wanted.

Q. He may have accumulated a considerable sum of money before he left for Japan, besides the \$300?

A. Maybe.

Q. Your best judgment is that he did?

A. Probably, because he did not get any money after that.

Q. He had no other business that you know of besides the [322] Oahu Junk Company here in Hawaii?

A. Yes, nothing else.

Q. So whatever he had he must have earned or accumulated in the years he was here, before he left for Japan?

A. That's right, yes.

Q. Then in 1938 he probably ran short of money so he collected the thirty-five thousand on that big shipment of junk?

A. Yes, probably so.

Q. Did he write to you about that?

A. I don't recall.

Q. Did he write to Yamamoto about that?

A. I don't—He may have, yes.

Q. Did you set it up on the books of the business?

A. Yes, accounts receivable outstanding to Yotaro Fujino.

(Testimony of Tokuichi Tsuda.)

Q. At that time he owned the business?

A. Yes.

Q. But in order so that you could account for this shipment you put it in accounts receivable outstanding?

A. Yes, that's right.

Q. To Fujino; Yotaro Fujino?

A. Yes.

Q. That was around thirty-five thousand dollars?

A. Approximately.

Q. And then there were two or three other items that ran [323] it up to about forty-one thousand?

A. Yes.

Q. And against that the only credit that you entered during these years were these three or four shipments which, as you thought, ran to about four or five thousand?

A. I think so, yes.

Q. Did you have any correspondence about these outstanding accounts at all between Yotaro Fujino and Yamamoto or between Yotaro Fujino and you, that you know of?

A. No, not that I know.

Q. He told you he collected?

A. Yes, the letter would come to Yamamoto; Yamamoto is the one who told us about it.

Q. He wrote to Yamamoto and said "I collected that and I will keep that; just charge that off to me in the business?"

A. Yes.

Q. That is what you did?

A. Yes.

Q. Now when the corporation was organized in 1940 was that still outstanding as an accounts receivable, prior to the incorporation?

A. Yes.

(Testimony of Tokuichi Tsuda.)

Q. What happened to that when the business was incorporated?

A. I think the auditors must have written that off to some [324] account that I do not know.

Q. Written it off the books?

A. Yes; that wasn't taken over by the corporation.

Q. In other words, the corporation did not receive an accounts receivable from Yotaro Fujino for that balance of thirty-five thousand when they received the rest of the assets of the business at that time?

A. That's right.

Q. That is correct, is it not? A. Yes.

Q. It was written off? A. Yes.

Q. Now I think you said that in 1940, in October or November, Yamamoto called you and Tsutsumi to his house?

A. That's right.

Q. And told you that he had a letter from Yotaro Fujino, and he showed you the letter, did he?

A. Well, he did not exactly showed but he sat opposite us; we sat opposite one another, and he had some correspondence there from which he had told us what Fujino wanted to know.

Q. And that correspondence lay on his desk?

A. Yes, right before Seitaro Yamamoto.

Q. Did he pick up the letter and read the contents of the letter to you?

A. Well, no, he would just hold the letter this way, in [325] this position (indicating), and tell us what the letter stated.

Q. You could understand the spoken Japanese well? A. Yes.

(Testimony of Tokuichi Tsuda.)

Q. And if someone who had it should read the letter to you; someone who was able to read it, while he read it to you would you know exactly what they were talking about? A. Yes.

Q. Although you might have difficulty in reading it, is that correct? A. Yes.

Q. But Yamamoto did not read this letter to you?

A. Well, he had the letter before me—before him, but I don't know whether he was reading from the letter or not, but I took it for granted that he was reading what was in the letter.

Q. Since you did not have any correspondence yourself, personally, with Yotaro, how did you know that was in Yotaro's letter?

A. Because while he was in the Territory I used to see his letters.

Q. You can also recognize that as Yotaro's handwriting?

A. Well, he has a peculiar way of writing, so it is something——

Q. But Yamamoto did not read from the letter; he just sort of said what was in it? [326]

A. That's right; yes.

Q. And Yamamoto told you that Yotaro Fujino wanted to go ahead with organizing the corporation? A. That's right.

Q. Told you that at that time? A. Yes.

Q. He told you that Yotaro Fujino in this letter said he wanted the stock issued in a certain way?

A. Yes.

(Testimony of Tokuichi Tsuda.)

Q. So many to himself; so many to his wife; so many to his three children?

A. I don't recall he mentioned about how many shares to be issued to each one.

Q. Well, did you get later instructions about that?

A. No, I don't believe I seen any instructions.

Q. How many shares—How do you know how many shares were to be issued to each one?

A. Well, Seitaro Yamamoto did all those distribution of figures.

Q. Well, when you were at his house that day didn't he say how much stock?

A. No, he didn't say how much stock.

Q. But did he say that the stock that was issued to the children,—that there should be notes back to cover it?

A. No, I don't remember his mentioning anything about the [327] notes.

Q. He didn't say anything about a note?

A. No.

Q. How did you get the idea of taking these notes back from the children?

A. Well, it was Mr. Seitaro Yamamoto's idea.

Q. You think that Mr. Yamamoto was carrying out instructions of Yotaro, that Yotaro was giving him in letters, when he expressed these ideas?

A. Yes.

Q. You feel that way?

A. Yes.

(Testimony of Tokuichi Tsuda.)

Q. In any event, the number of shares of stock and the notes that would go from the children to Yotaro were, you believe, in amounts on instructions from Yotaro, is that correct?

A. Yes, that's right.

Q. But you had not heard these specific instructions in any letter? A. No.

Q. Yamamoto had not referred to any letter to describe these specific instructions to you?

A. No, nothing that I can recall.

Q. But you do know of your own knowledge that the reason for taking the notes back from the three children was so that [328] the father could exercise control; you said "parental control?"

A. That's right.

Q. He wanted to exercise parental control over the corporation? A. Yes, for awhile.

Q. Now at the same time that you were at Yamamoto's house did he also talk about the real estate?

A. Yes, he did.

Q. And did he also talk about the mortgage for fifteen thousand dollars that was to be placed on the real estate?

A. No, that was not mentioned.

Q. When was that first thought of?

A. Well, when I went to the bank, and told them that we wanted a deed,—to deed the property over to Kaname. Well, they felt that since the corporation has taken over Yotaro Fujino's liability in that Oahu Junk Company, and had secured loans from the bank for \$18,500, so it was the bank's suggestion to secure that loan; they would like to have the property mortgaged.

(Testimony of Tokuichi Tsuda.)

Q. Let me see if I understand you correctly. In October or November, 1940, you were at Yamamoto's house? A. That's right.

Q. And Yamamoto expressed the idea that the land was to be transferred to Kaname?

A. That's right. [329]

Q. That is correct? A. Yes.

Q. But did not express the idea that the land was to be mortgaged? A. No.

Q. But you were attorney-in-fact for Yotaro Fujino along with Tsutsumi?

A. That's right.

Q. That was in, to be sure now, in October or November? A. Yes.

Q. Of 1940? A. Yes.

Q. Is that correct? A. Yes.

Q. And the corporation was organized in December, 1940, or late in November?

A. Yes, late in November.

Q. And the stock was issued?

A. A bill-of-sale.

Q. Was transferred between Yotaro and the corporation in November, or early December, 1940?

A. Yes, that's right.

Q. And the land was included in that bill-of-sale? A. That's right.

Q. Why was that?

A. Because Fujino did not want to include the land in the [330] corporation?

A. He wanted to give the land to the son.

(Testimony of Tokuichi Tsuda.)

Q. He wanted to give the land to his son?

A. Yes.

Q. And that was anticipated, you say, when the corporation was organized in December of 1940?

A. No——

Q. Or even before?

A. Way before, yes. That was explained to us by Yotaro Fujino when he left for Japan in 1935.

Q. Oh, that some day he would do something about that?

A. Yes, in 1935 he told us about what he intended to do in the latter years.

Q. During the incorporation, when it was organized, and when it received the business of Yotaro Fujino, the corporation assumed all of Yotaro Fujino's obligations? A. Not all.

Q. With some exceptions; generally, anyhow,—the twenty thousand dollars? A. That's right.

Q. And in March, 1941, you were going to deed the property to Kaname? A. Yes.

Q. Is that correct? A. Yes. [331]

Q. But the bank says, before you did it, "you put on a mortgage?" A. That's right, yes.

Q. And now you put on a mortgage for Yotaro?

A. Yes, that's right.

Q. And when you put the mortgage on you were acting for Yotaro? A. That's right.

Q. So even if it was understood in October or November that the land was going to Kaname, even in March, you acted with regard to the land for Yotaro? A. That's right.

(Testimony of Tokuichi Tsuda.)

Q. Well, had Yotaro Fujino told you about it; to put that mortgage for fifteen thousand on the land? A. No.

Q. But in doing it you were acting for him?

A. Yes.

Q. Now with regard to the land you actually did not pay any rent on this land until August, 1941, is that correct?

A. The payment was made in August, 1941, in a lump sum, yes.

Q. And you had decided, you say, a little while before that, perhaps some months before that, to pay \$300 a month, is that correct?

A. That's right. [332]

Q. And you and Tsutsumi had decided how much should be paid?

A. Well, Kaname was in the conference, so the three of us had, at the conference, discussed about that.

Q. And in that conference who were you acting for, Kaname or Yotaro or Yotaro's wife? You had powers for each one. Who were you acting for?

A. I was acting for the corporation.

Q. For the corporation? Well, with regard to these powers-of-attorney which you had who were you acting for?

A. The power-of-attorney at the time,—the property was already over to Kaname, so the power-of-attorney didn't have any bearing on the rental situation, so far as I was concerned.

Q. You were attorney-in-fact for Yotaro?

(Testimony of Tokuichi Tsuda.)

A. Yes.

Q. And Chiyono? A. Yes.

Q. And still for Kaname? A. Yes.

Q. And with regard to these three who were you acting for, in this conference, any of them?

A. No, none of them.

Q. Had you received any instructions from Yotaro with regard to how much rent should be paid? [333] A. No.

Q. But you and Tsutsumi fixed the amount?

A. We do not fix, but we told Kaname that was——

Q. Well, you told Kaname “We think the corporation should pay \$300 a month?” A. Yes.

Q. If that is all right, the corporation will pay \$300 a month? A. Yes.

Q. And Kaname said that is all right?

A. Yes.

Q. And he made no demand on you for rent before that time? A. No.

Q. And, in fact, made no demand on you for rent for two or three months? A. No.

Q. How was it that you came around to paying him rent in August, 1941?

A. Well, probably the company did not,—I don't mean that the company did not have the money to pay, but we thought of utilizing the money for the corporation as much as or as soon as possible, because the company would be needing money from time to time, and we found out that the company was in a position where we could pay out the rental.

(Testimony of Tokuichi Tsuda.)

Q. Did Kaname at any time make a demand on the company [334] for rent? A. No.

Q. No, he did not? A. No, he did not.

Q. Did he at any time ask you to sit down with him, to fix the amount of rent? A. No.

Q. That was entirely initiated from your side, you and Tsutsumi, you said "Come on Kaname; we better sit down and see what rent should be paid."

A. Yes, it may have been.

Q. Is that your best recollection?

A. Yes, that is my best recollection.

Q. Now when you were discussing rent did you also at the same time discuss the freezing of Yotaro's bank account?

A. No, I don't remember discussing anything about that.

Q. Well, Kaname told us a little while ago that you and Tsutsumi told him that he should start a checking account, do you remember that?

A. No, we haven't told him that.

Q. He said you did?

A. He did, yes, but I don't remember telling him anything of that sort.

Q. He also said that you discussed the freezing of Yotaro's bank account? [335]

A. Freezing?

Q. Yes, you know the freezing order?

A. Yes.

Q. You know when it went into effect?

A. Some time in July, 1941, I think.

Q. And all accounts of Japan nationals in Japan were frozen at that time, were they not?

(Testimony of Tokuichi Tsuda.)

Q. And that included Yotaro's account and Chi-yono's account? A. Yes.

Q. And nothing could be paid out of them without a license from Foreign Funds Control?

A. Yes.

Q. That is why you applied for this license later on? A. Yes.

Q. And Kaname testified that when you talked about rent you talked about freezing, too, do you remember that? A. Freezing, too?

Q. Yes, at the same time you were talking about rent?

A. I don't know what "freezing, too."

Q. "Also." You talked about rent; you also talked about freezing? A. Yes.

Q. And isn't it a fact that you told Kaname "you better [336] put this money in your account, because if you put it in your father's account it would be frozen?"

A. No, we haven't said anything of that sort.

Q. You did not? A. No.

Q. Well, am I to understand that the money was short with the Oahu Junk Company during May, June and July, and the first part of August, and that is why you did not pay any rent to Kaname?

A. No, the money wasn't short. We had sufficient money to pay, but we will be needing money from time to time, so we thought we would pay him at a later date when we thought the company was in a position to do so.

(Testimony of Tokuichi Tsuda.)

Q. You had the money to pay the rent?

A. That's right.

Q. But you did not pay it?

A. Yes, that's right.

Q. Because Kaname had made no demand on you for it? A. That's right.

Q. And he never did make any demand on you?

A. No.

Q. And you, of your own initiative, paid that rent, in August, 1941? A. That's right.

The Court: It is after four. We will adjourn for today, until tomorrow morning at nine.

(Adjourned to 9 a.m., November 7, 1946.)

Thursday, November 7, 1946, 10:23 A.M.

The within-entitled matter came duly on for further hearing, all parties being present as before, whereupon the following further proceedings were had and testimony taken:

(The Clerk calls the case for further trial.)

Mr. Jansen: By the way, The Executive Order Number of that executive order is Order Number 9788, File 11, Federal Register 11,981, an Executive Order of the President transferring the functions of the Alien Property Custodian's office to the Attorney General's office.

The Court: Thank you.

And the parties are ready for further trial?

Mr. Beebe: Yes, your Honor.

Mr. Jansen: We are ready.

TOKUICHI TSUDA

having been heretofore sworn, resumed the stand as a witness, and continued his testimony as follows:

Cross-Examination
(Resumed)

By Mr. Jansen:

The Court: Mr. Tsuda, you are mindful of the fact that you are still under oath, and you may proceed with the cross-examination.

Q. Mr. Tsuda, I am not clear in my mind whether all of the details of the incorporation, the issuance of the stock, and all of that, were discussed between you and Mr. Yamamoto [338] in that time between,—in October or November, 1940.

A. Yes, we had some general discussion of that.

Q. For example, it was discussed at that time that the corporation would be formed, and all of the assets of Yotaro Fujino would be transferred to the corporation except the real estate?

A. That's right, yes.

Q. And that stock would be issued at that time,—you didn't know just how many shares to each, is that right?

A. Yes.

Q. You were quite familiar with the Oahu Junk Company's business?

A. Yes, I was.

Q. And I suppose that when you discussed this with Mr. Yamamoto in 1940, when he had that letter from Yotaro, you discussed in general that the personal property, the good-will, and the fixtures

(Testimony of Tokuichi Tsuda.)

and equipment, and inventory, would be transferred to the corporation to be formed?

A. That's right, yes.

Q. And the corporation would assume the obligations of Yotaro Fujino's office?

A. Some of the obligations, yes.

Q. Some of the obligations? A. Yes.

Q. Well, were there some obligations that were not assumed by the corporation? [339]

A. No,—I beg your pardon. Some of the assets, I believe; not the obligations.

Q. Well, on the books of the business on November 1st, 1940, there were certain outstanding obligations of Yotaro doing business as Oahu Junk?

A. That's right, yes.

Q. And were all of those obligations assumed by the corporation, when the corporation was formed, and the bill of sale was given to it?

A. Yes, all the obligations were assumed.

Q. Did you see the copy of the bill-of-sale that has been offered in evidence?

A. With the exception of a few items, I recall.

Q. This is Defendant's Exhibit 4. This Defendant's Exhibit 4, is that a copy of the bill-of-sale?

A. Yes, it is.

Q. And attached to it are the assets and liabilities. Do you recognize that? A. Yes, I do.

Q. In the liabilities, there is \$30,000 in liabilities,—Was that all of Yotaro Fujino's outstanding obligations? A. Yes, it was.

(Testimony of Tokuichi Tsuda.)

Q. And of that thirty thousand, twenty thousand dollars was an obligation to the Bishop National Bank? A. That's right. [340]

Q. How was the other ten thousand?

A. The obligation of ten thousand was to two parties, Mr. Nogawa and Mr. Murakami,—five thousand dollars each.

Q. Do you mean Mr. Murakami, the lawyer?

A. Yes, that's right.

Q. What did you owe him five thousand dollars for?

A. Well, we needed the money, so we borrowed from him.

Q. When did you borrow that?

A. Oh, maybe about,—I don't quite remember, but probably around about 30—let's see, about 1939,—I am quite sure; about '39.

Q. About 1939?

A. Sometime in 1939, probably.

Q. Five thousand dollars in cash?

A. I don't remember whether it was in cash or check.

Q. Well, then when the corporation was transferred, or, say, organized, in 1940, you had \$55,000. in cash in the banks, did you not?

A. I don't remember the figures.

Q. I should say fifty-five thousand in cash and accounts receivable. You had cash in the bank of \$16,000., is that right?

A. Sixteen thousand dollars in the bank, and accounts receivable of fifty-seven thousand dollars, but the accounts receivable is not what is cash; we

(Testimony of Tokuichi Tsuda.)

didn't have these [341] accounts receivable.

Q. You had sixteen thousand in the bank?

A. Yes, that's right.

Q. Is that about the usual balance that you carried in the bank?

A. Yes, that is about the usual. Sometimes it goes as low as maybe five thousand.

Q. Do you recall the intent of this loan of five thousand? Do you know what that was for, the one from Murakami?

A. Well, we have been importing lumbers and so forth from the mainland, and when we had the lumber, it probably amount to around about eight or nine or ten thousand dollars, it was in order to meet those obligations.

Q. But you had a line of credit at the Bishop Bank of around thirty thousand, didn't you?

A. Yes, but sometimes that credit would not cover that.

Q. And do you mean the thirty thousand would not cover it? A. That's right.

Q. Do you remember the exact intent of Murakami's loaning you five thousand dollars?

A. No, I don't remember for what intent.

Q. Were you advised in any respect,—were his fees in any respect involved in that five thousand dollars? A. His fees?

Q. Yes. A. No.

Q. You are sure of that? A. Yes.

Q. How was it that you went to Murakami rather than the Bishop Bank for the five thousand?

A. Mr. Yamamoto went.

(Testimony of Tokuichi Tsuda.)

Q. To Murakami? A. That's right.

Q. Did you give Murakami a note for it?

A. Yes, we did.

Q. Who signed the note?

A. Two, the attorney-in-fact.

Q. And that, you think, was in 1939?

A. If I am not mistaken.

Q. In the early part of 1939 or the latter part of 1939?

A. Well, probably around about the middle.

Q. About the middle of 1939?

A. I would not say as to that.

Q. You do not remember at all the occasion for needing the five thousand? A. No.

Q. Did you ask Yamamoto to raise five thousand dollars?

A. Probably we discussed that we needed some money, so he mentioned all the loans from both of those parties. [343]

Q. Had you raised money from Murakami before? A. No.

Q. That was the first time. Had you raised money from this other party? Nakaya?

A. No.

Q. Was that the first time? A. Yes.

Q. Who is Nakaya?

A. He is something related to Yamamoto.

Q. Is Murakami related to Yamamoto?

A. No.

Q. You don't remember at all the reasons for needing the five thousand dollars?

A. Not the particular reason, yes.

(Testimony of Tokuichi Tsuda.)

Q. You are sure that was in the middle of 1939?

A. Well, to my recollection the condition was there in about 1939.

Q. Now you are sure of that?

A. Well, it has been quite away backwards, I cannot——

Q. Well, 1939 was a year before the corporation was formed. Might it have been 1938?

A. I cannot get my recollection on that.

Q. You don't know whether it was 1938 or 1939 or 1940? Could it have been 1940?

A. No, I didn't think it was in 1940; I think it was prior [344] to 1940.

Q. Do you know how long prior to 1940?

A. No, that I don't remember.

Q. You don't remember? A. No.

Q. That was a pretty big item, wasn't it, five thousand dollars?

A. Yes, but it has been quite sometime now. It has been four or five years. It is pretty hard to remember.

Q. Had you authority from Yotaro Fujino to borrow that five thousand dollars? A. No.

Q. No authority from him? A. No.

Q. Had you authority from Yotaro Fujino to borrow the five thousand dollars from Nakaya?

A. No.

Q. And you think that at the time you borrowed this five thousand dollars from Murakami you had used up your thirty thousand dollar line of credit at the Bishop Bank, huh?

(Testimony of Tokuichi Tsuda.)

A. It must have been, otherwise we would not need the money.

Q. Well, now, when you were discussing this new corporation, that Yamamoto discussed with you, in November,—October or November, 1940, didn't you discuss the fact that the corporation [345] would need the land to operate on?

A. Oh, yes, if the corporation would operate it would have to have the land to operate on.

Q. In fact, without the land the corporation,—it would be practically impossible for the corporation to operate?

A. Well, then, if we could rent the land, the premises, then it was all right.

Q. Well, did you discuss with Yamamoto in October or November the idea of renting the premises?

A. No, that I don't recall. I don't remember.

Q. Well, weren't you interested at all in knowing whether or not the corporation was going to have some place to operate?

A. Well, we knew that Kaname being one of the principal stockholders he would not throw the corporation out entirely.

Q. Did you know at that time that he would not throw the corporation out entirely?

A. Evidently——

Q. You also know that as soon as Yotaro had transferred the land to him that Kaname would rent the land to the corporation, at that time, didn't you?

A. Yes.

(Testimony of Tokuichi Tsuda.)

Q. And that was understood, wasn't it, in October or November? A. More or less, yes. [346]

Q. Certainly. It was also understood that Yotaro wanted to take these notes back from Kaname and his two sisters, because he didn't want them to squander the money? A. That's right.

Q. And that applies both to Kaname and to the sisters? And it was also understood at that time that in addition to the fact that Kaname would lease the land to the corporation, that the corporation could stay on the land as long as it wanted to?

A. That's right, yes.

Q. And that was also part of the instructions from Yotaro to Yamamoto?

A. I don't know whether any instructions came on that point.

Q. You discussed it at that time? A. Yes.

Q. Yotaro must have mentioned it in his letter?

A. No, I don't remember his saying anything about the rental arrangements, or anything of that sort.

Q. Well, at least between the three of you, Yamamoto, Tsuda and Tsutsumi, it was clearly understood? A. Between the three of us, yes.

Q. Yes? A. Yes.

Q. It was clearly understood that notwithstanding the [347] transfer to Kaname the corporation would continue to stay on the land and use the land?

A. Yes, since we paid the rent.

Q. At that time you did not know what the rent would be or whether there would be any rent?

(Testimony of Tokuichi Tsuda.)

A. No, we had not discussed it at that time, yet.

Q. It was not until Kaname came back to the Territory that any question of rent at all came up?

A. That's right.

Q. And you and Tsutsumi were the two who started the discussion on that?

A. That's right.

Q. Well, now, will you try again and think hard and see if you can remember when it was that Murakami loaned Yotaro Fujino five thousand dollars.

A. Well, probably it was 1938.

Q. You think now it might have been 1938?

A. About 1938.

Q. But you are not sure?

A. Sometime 1938 or 1939, one of those years.

Q. 1938 or 1939? A. Yes.

Q. Now with reference to the income tax of Yotaro Fujino, how was it that the corporation was interested in paying Yotaro Fujino's income tax? [348]

A. Well, we thought that we should try to help him out in paying his income tax, because he has been one of the stockholders of the corporation at that time.

Q. Is that the only reason?

A. And there was no other way of raising the money otherwise, if the corporation did not make a return.

Q. Why didn't you let the income tax department go after Yotaro for that income tax; it was his obligation, wasn't it? A. That's right.

(Testimony of Tokuichi Tsuda.)

Q. Why did the corporation assume to take care of that obligation?

A. Well, that I don't know. I didn't make the demand to him.

Q. And was it your suggestion that Kaname borrow eight thousand dollars from the corporation?

A. Yes, we discussed,—the three of us discussed; Tsutsumi, Kaname and me discussed.

Q. Who was it suggested that Kaname borrow eight thousand dollars? A. Probably I did.

Q. You did? A. Yes.

Q. But other than the fact he was one of the stockholders in the corporation, you had no other reason for undertaking to arrange to pay his income taxes? [349] A. That's right; yes.

Q. Now did you arrange to have the powers-of-attorney for Chiyono and Kaname prepared in December or November of 1940?

A. Kaname's power-of-attorney was prepared sometime about the same time as the corporation was formed.

Q. And Chiyono's power was prepared about the same time?

A. Chiyono's was a little after that, when the discussion of the deeding the property to Kaname came up.

Q. Of what?

A. When the discussion of the deeding of the property to Kaname came up.

Q. You had Chiyono's power before that?

A. Before that, yes.

(Testimony of Tokuichi Tsuda.)

Q. But how long after the corporation was formed was it that Chiyono's power,—you know Chiyono is Yotaro's wife?

A. Yes, that's right.

Q. You say that was after the corporation was formed, and when you were discussing the idea of the transfer?

A. That's right, yes.

Q. How long was that?

A. Oh, maybe a couple of weeks after.

Q. Oh, a couple of weeks after? A. Yes.

Q. Well, who prepared Kaname's power? [350]

A. I think Mr. Murakami did.

Q. And who prepared Chiyono's power?

A. I mean, Chiyono's power, Mr Murakami did.

Q. And who prepared Kaname's power?

A. Mr. Murakami did.

Q. Who prepared Yotaro's power?

A. On the second power, you mean?

Q. Yes.

A. It was done through the bank, the Bishop National Bank. I don't know who did it, but it was done through that bank.

Q. And how long after the two first powers were prepared was this second power prepared, the second power of Yotaro prepared,—the last one, I mean?

A. That was prepared around about the middle of December, if I am not mistaken.

Q. The middle of December? A. 1940.

Q. And when was it sent to Yotaro?

A. It was sent right after that, when we received the forms back.

(Testimony of Tokuichi Tsuda.)

Q. He said he got it sometime late in January. Does that change your recollection of it at all?

A. No, the two must have been sent out at the same time.

Q. What two?

A. Mrs. Fujino and Yotaro Fujino's.

Q. You think they were? [351]

A. They were.

Q. But Mrs. Fujino executed her power on December 23d, 1940? A. Just about the time.

Q. And Yotaro Fujino executed his power on February 20, 1941? A. That's right.

Q. Do you think they were both sent together?

A. To my recollection, yes.

Q. But Yotaro did not execute his until almost three months after his wife's, or two months, anyway? A. That's right.

Q. Do you know of any reason why he delayed in executing his power?

A. Well, in most of the time he was not at his home, from what I understand; he has been traveling, and it may be for that purpose that it was delayed.

Q. You think that might have been the reason?

A. Yes.

Q. He did not receive it, according to his letter to you, until January 20th? A. No.

Q. If that was true, how could Mrs. Fujino have executed her's in December?

(Testimony of Tokuichi Tsuda.)

A. Well, probably Mrs. Fujino,—Probably Mr. Fujino was not in, and when he got back from some trip he wrote a letter [352] in January, that is my opinion.

Q. Now, Murakami testified the other day that after he prepared the deed from Yotaro Fujino to Kaname Fujino you and Tsutsumi signed it?

A. Yes.

Q. And then he told you to go up and record it?

A. No,—

Q. That is what he testified to.

A. No, he told us to take it down to the bank, and let the bank look over that, and if it was all right to go and have it recorded.

Q. You took it to the bank? A. Yes, first.

Q. Did you take it down and have it recorded?

A. No, we took it to the bank first, and they asked me when Kaname would be back, and I told him he would be back most any moment, and they said “You might as well leave this that way,” and they wanted Kaname to endorse a note to that, and the deed was left there with the bank.

Q. There is one other question that disturbs me, Mr. Tsuda. You say that Yamamoto handled all the correspondence between Yotaro and the Oahu Junk Company? A. Yes.

Q. And who handled the correspondence after Yamamoto left for Japan? [353]

A. Some of the letters came in, but then I believe we did not answer questions,—we did not answer most of these letters.

(Testimony of Tokuichi Tsuda.)

Q. How long did you wait before you answered the letters?

A. Well, at the time Mr. Yamamoto left,—when Seitaro Yamamoto left, he told us if any letters should come it would not be necessary to answer, because he would be contacting those people on the other end.

Q. But this correspondence that was brought up yesterday shows that you were writing back and forth; you sent telegrams back and forth, and sent letters back and forth, didn't you?

A. Well, we may have written. I might maybe have asked someone to write maybe once or twice, yes.

Q. In any event, after Yamamoto went to Japan, Yotaro would write to you from time to time and tell you what to do about this and what to do about that?

A. No, I don't recall that.

Q. Didn't Yotaro write to you from Japan and tell you to elect Kaname president?

A. Yes, that was a telegram we received in August.

Q. In August? A. August 1941.

Q. August 1941. Yotaro wrote to you and told you to elect Kaname president?

A. He sent a telegram down, probably dated August 20, [354] 1941, yes.

Q. He also wrote a number of letters to you about different things that you were supposed to do, didn't he?

A. I don't recollect.

(Testimony of Tokuichi Tsuda.)

Q. Don't you recall that he wrote to you about the shipments of scrap rubber from here, and wrote to you about the shipment of cement from Japan?—

A. Yes.

Q. A number of times, after Yamamoto went to Japan?

A. Yes, probably he did, yes.

Q. Sure he did. And he wrote to you, or sent this telegram and told you to elect Kaname president of the company?

A. That's right, yes.

Q. And you answered back and said Kaname has been elected and so don't worry, everything is all right.

A. Yes, we let him know of that.

Q. Is that the substance of your telegram to him: "Kaname has been elected president; don't worry, everything is all right"?

A. After we received this telegram, yes; we let him know that he was elected president, I guess.

Q. And did you write him such a cable or such a telegram: "Kaname has been elected president. Everything is all right. Don't worry."?

A. I guess it may have been, yes. [355]

Q. And you sent money over to Japan from here at Yotaro's instructions, didn't you?

A. The money was sent to Hongkong.

Q. To Hongkong?

A. To Seitaro Yamamoto, I think.

Q. But Yotaro had instructed you to send that money?

A. Yes.

Q. Two thousand dollars in July, 1941, wasn't it?

A. Yes, I think so.

Q. On July 14th 1941, about that time?

A. Yes.

(Testimony of Tokuichi Tsuda.)

Q. And then Yotaro Fujino and Yamamoto asked you to get certificates and affidavits from the Bishop Bank so that he, Seitaro Yamamoto and Fujino could travel to the Philippines, which was United States territory, didn't he? A. Yes.

Q. And you did that?

A. Yes, I believe I did, yes.

Q. Now it was in October, 1941, that you sent a wire to Yotaro telling him that Kaname had been named president?

Mr. Beebe: If counsel has the telegram I suggest he show it to the witness.

Mr. Jansen: I don't have the telegram. I have a reference to it in the letter.

A. It may have been, yes. [356]

The Court: October?

Q. October, 1941. Yotaro Fujino and Chiyono Fujino had sent you proxies so that you could vote their stock; do you remember that?

A. No, I don't remember that.

Q. Well, look at this letter. You can read Japanese, can't you?

A. No, I would not understand.

Q. You would not understand? A. No.

Q. Well, did you, in October, 1941, send a cable to Yotaro Fujino in which you said "Received both of your proxies. Have made Kaname president. Please fill out each."

A. No, it must have been the stock certificate, probably; not the proxies.

(Testimony of Tokuichi Tsuda.)

Q. You mean that Yotaro and Chiyono sent their stock certificates back?

A. I think so. I don't remember receiving any proxies.

Q. Well, did you say, received something—maybe stock certificates, but did you say "Have made Kaname president. Please fill out each." Was that part in the telegram?

A. Maybe, yes.

Q. After the corporation was formed you sent monthly reports on how the business was getting along, to Yotaro Fujino? [357]

A. Yes, Yamamoto would send.

Q. And after Yamamoto went away Yotaro Fujino wrote to you and asked you to send the same monthly reports, didn't he?

A. No, he didn't make any request.

Q. Take a look at this letter and see if it does not—Can you read them?

A. No.

Q. You can't read them, huh?

A. No.

Q. What would you do when you would get these letters?

A. Have somebody read it to me.

Q. Do you remember getting this letter dated June 13, 1941?

A. I may have somebody read this letter.

Q. Who would you have read it to you?

A. Maybe one of the boys in the store who understood how to read.

Q. How about Kaname?

A. Kaname may have read it to me.

Q. Didn't Kaname read all of the correspondence from his father when he was here, after May 1941?

A. Not all the correspondence.

(Testimony of Tokuichi Tsuda.)

Q. He left that up to you?

A. No, not that. At his convenience he read some of them. [358] If he was out, if we wanted to know about it, we let some other fellow read to us.

Q. Do you recall receiving a letter that was read for you by Kaname, or someone else, asking for monthly reports; a letter dated June 13th or about that time, 1941?

A. If that is in the letter, then I must have received it.

Q. And Yotaro Fujino wrote to you late in July or early in August about the effect of the freezing order too, didn't he? A. July or August?

Q. Yes. A. He may have, yes.

Q. Do you recall that he did?

The Court: 1941?

Mr. Jansen: Yes.

A. He may have, yes.

Q. What is that?

A. If that is in the letter, he must did it.

Q. Do you recall that Yotaro wrote you about the freezing, and suggested that maybe some sort of a barter system could be set up? You know what "barter" is, don't you? A. No.

Q. Barter? A. Barter?

Q. Barter; changing one for the other. They sent, let's [359] say, shoyo or beer or cement from Japan, and you would send molasses or rice back.

A. Yes, I guess so.

Q. Do you remember him writing to you about that?

(Testimony of Tokuichi Tsuda.)

A. Yes, I recall he wrote something like that.

Q. So he wrote to you about a number of things after Yamamoto went to Japan in 1941; a number of things relating to the business of the company?

A. Yes, he might have written.

Q. You recall that he did, don't you?

A. Yes.

Q. And when you would get these letters from Yotaro you would try to carry out his instructions as carefully and completely as you could?

A. That's right, yes.

Q. Who did you talk to at the Bishop Bank about the transfer from Yotaro to Kaname?

A. I quite could not recollect, but I think when I went to the bank, went down to the bank, to my recollection I think I must have spoken to Mr. Stanley at the Bishop National Bank.

Q. Mr. Stanley? A. Yes.

Q. Are you sure you didn't talk to Mr. Waterhouse?

A. No, I don't—Probably I spoke to Mr. Waterhouse, and [360] he referred me over to Mr. Stanley, probably.

Q. How about Mr. Tyler?

A. No, I don't think so, Mr. Tyler.

Q. Have you been able to find the receipt that you gave Kaname for eight thousand dollars on the note from Kaname to his father?

A. No, we are unable to locate.

(Testimony of Tokuichi Tsuda.)

Q. You haven't been able to find any receipt?

A. No.

Q. There is one other thing, Mr. Tsuda. You said Yamamoto came into the office only two or three or four times a month. Is that correct?

A. Most of the time, yes.

Q. And how long would he stay?

A. He stayed, oh, maybe, about two or three hours.

Q. Two or three hours?

A. Or maybe one hour, maybe three hours, the longest, probably.

Q. Three hours at the longest? A. Yes.

Q. So if he came in four times a month he would not spend over 12 hours in the whole month at the office?

A. Yes, he did most of the work at home.

Q. Did he have any of the books of the company at home? A. No. [361]

Q. Did he have any of the accounts of the company? A. No, no accounts.

Q. All he had to do with was the correspondence, is that right? A. That's right.

Q. Between Yotaro and the Company?

A. That's right.

Q. Nothing else? A. No.

Q. Then from time to time you would seek his advice with regard to various transactions?

A. Well, with anything that was difficult to solve, he is the one who used to advise us, yes.

(Testimony of Tokuichi Tsuda.)

Q. But he would spend as little time as one to three hours and not more than two, three or four times a month?

A. I would say sometimes he has been down there the whole day, when he feels a little better, but on the average, yes.

Q. What else did he do? Did he have any other business interests?

A. Well, he used to go around quite a bit to these various industrial places looking over junks and all that stuff when he felt better; making contacts, now, like with scrap iron and all that stuff; he used to handle all of that.

Q. Do you mean he would buy it?

A. Make the price arrangements, and all that stuff. [362]

Q. Who bought the scrap iron after he left?

A. Haven't bought any scrap iron.

Q. Do you mean 1941?

A. We bought scrap metal, but not iron.

Q. Scrap metal? A. Yes.

Q. Who bought that?

A. Well, we would buy that; that was the daily routine of the business.

Q. Who bought that before Yomamoto left, the scrap metal? A. Metal, yes; well, we did.

Q. But occasionally he would go out and buy scrap iron on plantations or other places?

A. Yes, on big deals he would.

Q. Do you recall that Yotaro wrote to you in 1941 asking you to buy scrap metal or some sort of

(Testimony of Tokuichi Tsuda.)

metal, ship metal, for the aircraft factories in Japan? A. Aircraft factories?

Q. Yes. A. No, I don't remember.

Q. When did Yamamoto leave for Japan?

A. He left in the early part of April, 1941.

Q. 1941? A. Yes.

Q. Do you recall in March, 1941, receiving a telegram from [363] Yotaro Fujino—March 23, with regard to the new iron for the Shinkoo Aircraft, Koogyosho, Shimura?

A. No, that is the first time I heard of it.

Q. Did you bring this telegram down to the court, you and Tsutsumi and Kaname?

A. No, I didn't bring it. Anything brought out, maybe he found that in Yamamoto's desk.

Q. You didn't know anything about that?

A. No.

Q. You got a letter later from Yotaro Fujino after Yamamoto left, didn't you?

A. Yamamoto might have gone back and talked over the things.

Q. You mean you didn't know anything about that?

A. No, I don't know anything about the aircraft.

Q. All right. Did Kaname write any of the business letters to his father after Yamamoto left?

A. I don't remember whether he wrote any business letters.

Mr. Jansen: No further cross-examination.

The Court: Redirect?

(Testimony of Tokuichi Tsuda.)

Redirect Examination

By Mr. Beebe:

Q. In all of these questions addressed to you, Mr. Jansen has used the expression "Letters addressed to you." Now do you recall ever having received a letter from Mr. Yotaro Fujino [364] addressed to you personally?

A. From Yotaro Fujino to me personally?

Q. Yes.

A. No, there wasn't any letter addressed to me personally.

Q. Now might I ask whether or not the correspondence was addressed to the corporation?

A. Any business, yes.

Q. You have been asked whether or not you received or you were able to locate the receipt, or a receipt concerning the eight thousand dollars. Now was there any corporate action taken with reference to that tax liability of Mr. Fujino's—Yotaro Fujino?

A. Yes, we had a meeting on that, I am quite sure, and that matter was discussed.

Q. And were minutes of that meeting kept?

A. It must be kept, yes.

Q. Directing your attention to page 15 of a blank book in red, the "15" being in blue, I will ask you what that book it.

A. This book here? (Indicating)

(Testimony of Tokuichi Tsuda.)

Q. Yes. A. This is a minute book.

Q. Of what? A. Of the corporation.

Q. By the corporation, you mean the Oahu Junk Company, Limited? [365]

A. That's right, yes; of the meetings that we have.

Q. I will ask you to examine page 15, and ask you if that is a true record of the minutes of the corporation held on June 2, I believe, 1945; is it?

A. 1942.

Q. 1942. Concerning the loaning of eight thousand dollars to Kaname? A. Yes.

Q. And when, if you know, were these minutes made up with reference to the day of the meeting?

A. When the minutes were made up?

Q. Yes, with reference to the time of the meeting?

A. The minutes was made up probably about two or three days after the meeting.

Q. And were they kept in the regular order of business of the corporation? A. Yes, it was.

Mr. Beebe: I would like to offer in evidence at this time, if the Court please, the minutes of this meeting, particularly page 15.

Mr. Jansen: No objection.

The Court: It may be received as Plaintiff's exhibit next in order. That will be "P."

Mr. Beebe: May I ask that we be permitted to make a copy of this and substitute it for the book?

Mr. Jansen: Surely.

(Testimony of Tokuichi Tsuda.)

(Book offered in evidence, page 15 thereof, received and marked Plaintiff's Exhibit "P," with right of substitution of a copy to be so marked.)

[Plaintiff's Exhibit "P" set out on pages 526-527.]

Mr. Beebe: Page 15. I would like to read it to your Honor, so that your Honor might have it in mind. It is headed: (in caps.) "Minutes of meeting of the Board of directors of Oahu Junk Company Limited, held at the office of the company at 1217 North (N) King street, Honolulu, T.H. on June 8, 1942, at 2:30 p.m.

"Upon notice duly given, a meeting of the Board of Directors of Oahu Junk Company, Ltd. was held at the time and place above mentioned: Present: Kaname Fujino, Tokuichi Tsuda, Yasuo Tsutsumi Mitsugi Maneki Shizue Maneki, by proxy. Absent: Tadashi Fujieki Katsue Fujieki.

"The meeting was called to order by Kaname Fujino, President. He explained the purpose of the meeting and then the matter was referred over to T. Tsuda, vice-president. T. Tsuda, then further explained that the license to transfer 10 shares of Y. Fujino's stock to the Company as recorded in the minutes of May 15, 1942 has been denied by the Foreign Funds Control. T. Tsuda stated that since the license has been denied and that the money had to be raised for Y. Fujino in order to make his 1940 additional tax payment due to the United States

(Testimony of Tokuichi Tsuda.)

Government, he suggested that the Company make an advance of [367] \$3,541.53 to Y. Fujino upon the security of savings account balance with the Yokohama Specie Bank at Honolulu, and also to make an advance to Kaname Fujino of \$8,000 upon his written agreement to apply the monthly rental of \$300 due him from the Company together with the security of savings account with the Pacific Bank in the sum of \$1,515.38 in the name of Kaname Fujino; then to have Kaname Fujino pay the \$8,000 advanced to him by the Company to his father, Y. Fujino in part payment of his indebtedness so as to enable his father to pay said taxes.

“After some discussion, Y. Tsutsumi moved that the above mentioned advances be made by the Company. The motion was seconded by M. Maneki and was unanimously carried.

“There being no further business, the meeting was duly adjourned at 3:30 p.m.

“Dated; Honolulu, T. H. June 8, 1942. (Signed) Shizue Maneki, Secretary.”

Q. Now do you recall a telegram received from Mr. Yotaro Fujino along in September of 1941 regarding a \$500 present to be made to Tsutsumi's brother upon marriage?

A. Yes, I remember that.

Q. Now was there any corporate meeting, or any discussion of any kind, between yourself, Tsutsumi and Kaname regarding that \$500?

(Testimony of Tokuichi Tsuda.)

A. Yes, Tsutsumi, Kaname and I got together on that, and [368] after discussion, due to the fact that the corporation funds was frozen, we could not very well pay it in money from the corporation, and unless we obtained a license from the Foreign Funds Control, and so we had in mind probably the Foreign Funds Control would not permit a license for the purpose in such an amount, and so I suggested that Kaname advance the money for the corporation.

Q. Oh, your funds were frozen at that time, and you knew it would be hard to ask the Foreign Funds for \$500 to make the payment, is that about it?

A. That is it, yes.

Q. Now you were questioned somewhat about the power-of-attorney received by Yotaro. I will ask you to examine the translation to Exhibit L, being the letter of January 16th 1941, and particularly to the post-script, reading: "As I have already received my power of attorney, I will immediately go to the American Consul—" and ask if that portion in any way refreshes your recollection as to the time that that power-of-attorney was sent? Apparently he had received it on January 16, 1941, because of that letter.

A. Well, I still think that the power-of-attorney to Yotaro Fujino and Chiyono Fujino must have been sent out about the same time.

Q. And that was in December, sometime in December of 1940?

A. Yes, in December. [369]

(Testimony of Tokuichi Tsuda.)

Q. Now, directing your attention to the conference or the conversation that you had with Yamamoto at the home, was all the details given by you to Mr. Jansen all discussed at one time, and at that one conference, at the home?

A. Yes, in general.

Q. But were there other conferences at other times and places?

A. Yes, there were conferences; we had occasion to go, I or Harry, or we both went with Seitaro Yamamoto to Mr. Murakami's office.

Q. Where were the details worked out, at the home, or Murakami's office, or elsewhere?

A. The details of the whole thing probably was suggested by Yotaro Fujino and the whole thing was worked out mostly at Murakami's office.

Q. At Murakami's office? A. Yes.

Q. How many conferences would you say were held altogether up to the time of the incorporation?

A. Oh, there were several; probably around about half a dozen times.

Q. Now with reference to the note taken back from Yotaro or from Kaname and his two sisters, was there ever anything said about the fear of the future, that they would squander the money? [370]

A. No, not in that sense; not squander the money.

Q. Well, you used the term, in your direct examination, of "parental control?"

A. That's right, yes.

(Testimony of Tokuichi Tsuda.)

Q. Do the terms "parental control" and "squander the funds" mean the same thing to you?

A. Well, probably they were afraid they may just spend it too freely.

Q. Well, now, which is the case? Originally you said that the old gentleman wanted to retain some parental control?

A. Yes.

Q. Where did you get that first idea?

A. Well, he had in mind probably the children were young yet, especially Kaname hasn't had any business experience at all, and he wanted Kaname to go to school and work in the store.

Q. Where did you get the idea for the expression that you used, "parental control?"

A. Well, it is just my thought.

Q. And was it just your thought when you said to Mr. Jansen you did not want him to squander the money; was that just your thought, too?

A. It may have been, yes.

Q. Well, now, what is it, please?

A. Well, squander the money,—he did not want them to [371] spend foolishly.

Q. He did not want them to spend foolishly, and squander means to spend foolishly?

A. Yes.

Q. Yes. Where did you get that idea, from anything Yamamoto said or any letter that you read, or what?

A. No, that is a general idea; my opinion.

Q. All right. Now let's go to Yamamoto and inquire a little bit. Was he a drinking man?

(Testimony of Tokuichi Tsuda.)

A. Yes, he used to drink quite a bit; not to the extent where he lose his mind, but he likes to drink off and on.

Q. Was that somewhat the reason why he was not around the office, or was it,—was it his health?

A. That is the reason.

Q. Was that a condition that existed over a long period of years?

A. Yes, since I knew him he used to be a moderate drinker but gradually as he went on for awhile he used to go on drunk,—not drunk but just continually drinking for a month.

Q. Now during the time that Kaname's father was here, what was the relationship between the two of them with reference to business?

A. Well, they were the two that always go up together on any matter that were discussed. Well, there were some business, Army and Navy business, any big activities, Mr. [372] Fujino will discuss it, or Yotaro Fujino will discuss it with Yamamoto on all these big deals.

Q. Did that relationship continue on so far as you boys were concerned?

A. Yes. Only on big deals, and things like that, and in the main that is the big items Mr. Fujino had consulted, but he seemed to have confidence in Mr. Yamamoto's opinion on the large thing.

Q. How about after Fujino went back to Japan, did that same relationship continue on between yourself and Tsutsumi and Yamamoto?

A. I don't quite get you on that point.

(Testimony of Tokuichi Tsuda.)

Q. Well, let's put it this way: After Fujino left for Japan—— A. Yes.

Q. Did you and Tsutsumi rely on Yamamoto in the big deals and so forth and so on?

A. Oh, yes, we did.

Q. And you continued along the same as the old man did? A. Yes, that's right, yes.

Q. Well, now, why did you do that, rely on Yamamoto, on these big deals?

A. Well, it seems to me that while Mr. Yotaro Fujino left for Japan he told Tsutsumi and I that we were still didn't have the experience that Yamamoto had, and he told me [373] at the time that he knew Yamamoto way back some time in 1915 when he started the business, and when Yamamoto was down at the Waimanalo Plantation, and Fujino used to go there quite often and seen him there, and he had been known,—those two had known each other since about 1915, and in all the dealings that Yamamoto had suggested things came out fairly to his judgment, so Fujino on that ground, Fujino thought his confidence in Yamamoto in the business.

Q. Now at the time those first powers-of-attorney were drawn, do you know of any reason why the three of you were not named, rather than the two,—just the two of you?

A. Well, probably the only reason that I can give is he drinks a little too much, is about all I know.

Q. Well, now with reference to correspondence between the old man, Fujino and Yamamoto, was

(Testimony of Tokuichi Tsuda.)

all of that correspondence so far as you know kept in the office, or was some kept in the office and some taken elsewhere by Yamamoto?

A. Well, we haven't given very much attention to those letters, but to the best of my knowledge the letters, most of them, were kept by Seitaro Yamamoto.

Q. What do you mean "kept by him?"

A. At his home.

Q. At his home? A. Yes.

Q. Have you gone to Yamamoto's home to ascertain whether [374] or not there was any correspondence at his home?

A. No, I never did, but I understood from Kaname that he did go.

Mr. Beebe: I think that is all.

Recross-Examination

By Mr. Jansen:

Q. There wasn't any doubt at all times that Yotaro wanted to exercise parental control over these children, and that is why he took these notes back, was there? A. Yes.

Q. You knew that to be a fact?

A. Yes, that's right.

Q. And you also knew it to be a fact that he did not want them to squander the money?

A. Yes, that's right.

Mr. Jansen: No further questions.

Mr. Beebe: That is all.

The Court: You are excused.

(Witness excused.)

The Court: We will take a recess.

(Recess.)

(Following the recess the Court convened and all parties were present as before, whereupon the following further proceedings were had and testimony taken.) [375]

ROBERT K. MURAKAMI

recalled as a witness for the plaintiff, having been heretofore duly sworn, testified as follows:

Direct Examination

By Mr. Beebe:

Q. You have already been sworn, Mr. Murakami? A. Yes.

Q. You have heard the testimony with regard to the obligation of five thousand dollars to you by the Oahu Junk Company, Limited, at the time of its incorporation. A. Yes.

Q. Will you tell us, Mr. Murakami, whether or not prior to the incorporation Mr. Fujino was indebted to you in the amount of five thousand dollars? A. He was.

Q. And will you tell us the circumstances under which that obligation arose?

(Testimony of Robert K. Murakami.)

A. That is a pure and simple loan to Mr. Fujino in his business. In other words, I gave,—I don't recall whether or not it was in a check or not, but as I remember I drew some money out from the Pacific Bank and, I don't know,—right over the counter, I guess, and down at the Pacific Bank I did make the loan, and I think it was Mr. Yamamoto who came down and took the money. I think it was a cashier's check, if I am not mistaken, taken out of my savings account. [376]

Q. And when you said "Mr. Fujino" you meant Mr. Yotaro Fujino?

A. Yes, Yotaro Fujino, who is represented here by his attorneys-in-fact, and Mr. Yamamoto acting for them came to me, to my office, and got the loan from me.

Q. And it was a loan of five thousand dollars; not an obligation arising because of professional services rendered, is that correct?

A. No, it is a plain personal loan. It was not for any lawyer's fee or anything of the kind.

Q. And do you remember approximately the year in which that money was loaned?

A. I don't remember, except it was 1938 or 1939, somewhere around there; I may have the note. I may have the note. (Looks at papers.) Well, I don't think I have the note, but I may have a record of it in my office.

Q. Well, during the next hour will you look up and give us the exact date upon which that loan was made?

A. Yes, I will do that.

(Testimony of Robert K. Murakami.)

Q. Now you visited Mr. Yotaro Fujino in Japan and stayed at his home?

A. Yes; I stayed at his home, too.

Q. Will you tell the Court what type of home it was, and what type of piece of property it was, and so on?

A. I cannot give you a too good description of it, but a [377] nice home, a big home. I remember it was two-story, and in a very nice part of Tokio, and it looked like a very impressive mansion.

Q. Approximately how many rooms were there, upstairs and downstairs?

A. Well, Japanese houses have so many rooms that I would not be able to give an estimate. It certainly was not two or three; it had ten, maybe, or maybe more.

Q. What type of construction?

A. I think it was a brick roof; what we would call a combination Oriental and Occidental,—a mixed type of residence, in a rather exclusive, I would say, residential district.

Q. About how large was the piece of property upon which his home was situated?

A. It looked,—all those homes around there, were about the same size; they looked pretty big; maybe about 100 or 200 or something like that; I would not be able to describe very much about it.

Q. I am talking about the land.

A. Yes, the land, I would say, was 100 feet by 200 feet, maybe.

Q. Any servants about the home?

(Testimony of Robert K. Murakami.)

A. I think there was.

Q. Do you remember how many?

A. One or more than one; one or two; two I think. Of course [378] I would not know whether they came, you know, merely because we were guests there for a few days, or not; I don't know. I would not say whether they were permanent servants or not. I would not know.

Q. During the time you were there you were under the impression that there were either one or two? A. Yes, one or two. I think two.

Mr. Beebe: I think that is all. We will get the date when the loan was made.

Cross-Examination

By Mr. Jansen:

Q. How are you going to check the date that the loan was made?

A. I will look at my own record.

Q. Do you think you may have the note, too?

A. I don't know about the note. I don't think so. That has been paid off already.

Q. What kind of record?

A. My own personal record. I have files. I have for income tax purposes and so forth. I have my files. I am pretty sure I have a record, so I think I can find out the dates and so forth.

Q. Will you bring the records with you?

A. Yes, and I will bring the record if I have it.

Q. It was in 1940 that you visited Yotaro Fujino's home [379] in Tokio?

A. Yes, that's right.

(Testimony of Robert K. Murakami.)

Q. Do you know how long he had owned that home?

A. From information gathered from him, a few years before that he had bought it.

Mr. Jansen: No further questions.

Mr. Beebe: There is one further question that I should perhaps have asked correctly on direct, and I will ask permission to reopen.

Mr. Jansen: No objection.

Direct Examination
(Resumed)

By Mr. Beebe:

Q. At the time these last powers-of-attorney were prepared and sent to the Fujinos in Japan, can you tell us why a deed was not sent for execution by the Fujinos rather than powers-of-attorney and later deeds by the attorneys-in-fact, Mr. Murakami? A. Well——

Q. If there was a reason.

A. Yes, I think there was a reason. Mr. Fujino had several pieces of property; that is, several pieces, some contiguous, some separated, and as I said before, I think one or two pieces of property were held in his name as "Yootaro" Fujino, and the others were held in his regular name; that is "Yotaro," and also I didn't have at the time the description of all [380] the properties handy with me. Some of the properties, as I said before, were under mortgage to the Bishop Bank, and it was a

(Testimony of Robert K. Murakami.)

matter of the bank, to the extent, as I thought at that time, of the indebtedness of Mr. Yotaro Fujino to the bank, to have a real property mortgage on his property before the completion of the incorporation and the transfer of the real property to Kaname.

And then further, as I recall, the power-of-attorney which had been drawn for Chiyono Fujino to Tsuda and Tsutsumi recited the fact that she was doing business as Oahu Junk Company, which I knew to be not a statement of fact, and I am not so sure about it, but I think there was some doubt as to whether or not the right of release of dower was in the general power-of-attorney from Chiyono, and as I explained before, the—well, in making,—the mechanics in preparing the deed, it looked very inconsistent or at least very awkward to have to refer to two powers-of-attorney of Yotaro Fujino. Of course we might have made two separate deeds covering that, but having in mind the other question of getting Mrs. Fujino's power-of-attorney back to her, and so forth, my suggestion was, and they decided, well we might as well get the new power-of-attorney and get everything all straightened out.

Q. Well, now, was there anything about the bank obligation that caused the powers-of-attorney to be drawn rather [381] than a deed direct from the Fujinos, Kaname's father and mother, rather than powers-of-attorney?

(Testimony of Robert K. Murakami.)

A. Well, as I said, we had to make the mortgage, and the bank mortgage would be the same, in drawing the mortgage we would also have to refer to two powers-of-attorney. That was the understanding, and all agreed that that mortgage would come first, and the transfer would be subject to the mortgage. That is, the transfer to Kaname was to be subject to the mortgage, and we were to send the deed over. We certainly could not let him sign the deed first without the mortgage being executed, and taking into consideration everything we thought it was best to have the powers-of-attorney sent down and sent back here, and then have the mortgage executed, and then make the transfer of the land subject to the mortgage.

Mr. Beebe: I think that is all.

Cross-Examination

By Mr. Jansen:

Q. Were the powers for Chiyono, Kaname and Yotaro all prepared at the same time?

A. My recollection is, I tried to look in my files,—but my recollection is the one for Kaname was prepared first. That is, I mean in my office, because we had the proposition of letting the attorneys-in-fact here sign the notes for the shares, because Kaname was not here, so I remember rushing [382] that first, and then turning it over to the Oahu Junk Company, either Mr. Tsutsumi or Mr. Yamamoto, I don't know who,—to have it sent immediately.

(Testimony of Robert K. Murakami.)

Q. You thought the most important thing was to get the obligation from Kaname on the shares fixed up first?

A. No, I would not say that. You see, we wanted to make,—and as I explained first, the corporation was incorporated with a thousand dollar capital, and then we had to make the transfer of the entire assets from Mr. Yotaro Fujino to the corporation, and part of the consideration for the transfer was the issues of the shares.

Q. Were Chiyono and Yotaro's powers prepared at the same time?

A. That is right following that, around there.

Q. Well, were they prepared at approximately the same time?

A. Approximately, as I recall, completed,—the one for Kaname first, and then started with Chiyono, and as I recall the other one was prepared by the bank.

Q. You did not wait for the powers-of-attorney to organize the corporation——

A. No, we did not.

Q. From Yotaro and Chiyono? A. No.

Q. And you did not wait for the powers-of-attorney to [383] transfer the assets of the Oahu Junk Company to the corporation? A. No.

Q. That was all done before new powers had been prepared for Chiyono and Yotaro?

A. I think just about the same time, because, as I said, it was more because of the land, that we realized more fully that it would be better to get a new power-of-attorney.

(Testimony of Robert K. Murakami.)

Q. In other words, the corporation was organized and the stock was issued and Kaname's power-of-attorney had been executed, and returned, and his note for the stock was signed, all before the new powers-of-attorney were prepared for Chiyono and Yotaro in connection with the transfer of the land?

A. I would not make a definite statement that it was all before. That preparation of the new power-of-attorney,—because all of that was all about the same time, and I know that the transfer of the business assets, exclusive of the land, was made somewhere in the first part of December, and on or about or about that time it was that I was preparing the power-of-attorney for Chiyono Fujino, so I don't know whether it came first or not.

Q. The corporation was organized in November?

A. November 27, if I am not mistaken.

Q. And the plan of incorporation and the issuance of the [384] stock was carried out directly after that? A. Shortly after that, yes.

Q. And Kaname's power had been sent on its way so his attorneys-in-fact would have authority to execute the note for him?

A. That's right.

Q. And after all that was done the new powers were sent to Yotaro and Chiyono for the transfer of the land?

A. Yes, as far as the sending, it must have been somewhere around the first or middle part of December. As to the preparation, I would not be sure it

(Testimony of Robert K. Murakami.)

was done right after. It was more or less one action.

Q. At the time of the transfer of the assets of Yotaro Fujino as an individual to the Oahu Junk Company, Kaname was not the owner of the land?

A. At that time Kaname was not the owner of the land, no.

Q. And did not become the record owner of the land until May, 1941, is that right?

A. That is correct, yes.

Q. By deed executed in March, 1941?

A. Yes, that is correct.

Q. What arrangements were made at the time the corporation was organized and the bill-of-sale was given to the corporation for rental of the land?

A. That I have no—I did not get into that phase of it with the company or with Mr. Yotaro Fujino's attorneys-in-fact.

Q. You had nothing to do with that?

A. As I recall, I did not,—I was not consulted about that, particularly, anyway; that is my recollection.

Q. As far as the records of the corporation are concerned they show nothing with regard to the land that they were to occupy until after that,—or until late in 1941, do they?

A. Yes, as far as I have examined the record I do not think it shows anything about the occupancy of the land, except, you might say, the fact that it is recited that the office of the corporation was going to be right there at 1217, the same address there.

(Testimony of Robert K. Murakami.)

Q. But then aside from the fact that the office was going to be at the same address, was to be established at that address, no arrangements whatsoever were made for the land, for the occupancy of the land, for the rental of the land, or anything of that nature, until late, or at least in the middle of 1941?

A. As far as I know, whatever arrangement, or what the understanding they had, I know they probably took it for granted, but I had nothing particularly to do with that, and I have no definite recollection of any transaction along that line. [386]

Q. Didn't you, as an attorney, feel called upon to ask why the land would not be transferred to the corporation?

A. We discussed the entire thing, and I would not say I called their attention to why it was not transferred. As I explained to you the last time, I think Mr. Fujino had expressed the desire to me when I was talking to him in Japan, discussing the entire matter with him in Japan, so that fact came in the discussion here, when the corporation was to be formed. I did not say that, well, you should put it in the corporation.

Q. In view of the fact that you had some information on that land, that it was to be transferred to Kaname, didn't you consider it your responsibility, as counsel, to call their attention to the fact that it had no place to do business, and unless arrangements were made they would not have any place to do business?

(Testimony of Robert K. Murakami.)

A. I may have been remiss in my duties, but I didn't think of it in that light, figuring that Kaname was going to be one of the substantial stockholders.

Q. In other words, you inferred they would go right on and they would continue to operate there on the same land, regardless of who owned the land?

A. More or less in that sense.

Q. In fact, there wasn't any doubt about it in anybody's mind? [387]

A. I don't think there was any doubt as to where the place of business was going to be. I don't think anybody thought the corporation would be kicked out from the premises.

Q. You were quite confident that there was not going to be any change in that; that is why it was not necessary to bring it up?

A. Well, I just didn't.

Q. Let me ask one more question there. Besides the land that Yotaro Fujino conveyed by this deed of March, 1941, did he own any other real estate in the Territory of Hawaii that you know of?

A. You are referring to the deed of March, 1941?

Q. Yes. A. I think that was all.

Q. In other words, the property referred to in this deed, Plaintiff's Exhibit H, was all of Yotaro Fujino's property in the Territory,—that is, all of his real property?

A. As far as I knew, and as I gathered from all the conversations, and with the attorneys-in-fact,—Mr. Yamamoto, this constituted the entire real estate holding of Mr. Fujino here.

(Testimony of Robert K. Murakami.)

Q. Did he at any time between the time you saw him in Japan in 1940, and the time this deed was executed, transfer any other real estate to his other children,—the two daughters? [388]

A. As to that, I do not have any recollection, definite, but I remember some such transaction as to a building, the father calling for a building to be built for one of the daughters, or something along that line. Now I may be mistaken.

Q. Did he own any other real estate in 1940 that you know of besides that described in that deed, Exhibit H?

A. I don't know—I do not have any recollection of that.

Q. Your best recollection is that that was all of his property?

A. Yes, at the time this conveyance was made, around the first part of 1941, March, my recollection is that that was all.

Q. All of his real estate?

Q. All of his real estate.

Q. And from 1940, when you were in Japan, until that time in March, you don't know of any other real estate that he may have owned, and may have transferred to one of his daughters?

A. That is where I am not sure. It may be that the daughters or one of his sons-in-law may have bought some land or made an agreement to buy some land, and the old gentleman helped some and built the house or something like that. I have faintly in my recollection some such deal as that now; that

(Testimony of Robert K. Murakami.)

they were handling lumber, and there was something about building a house or helping to build a house, [389] something like that.

Q. He may have helped one of the daughters build a house? A. Yes.

Q. But aside from that, you know of no real estate that was conveyed to any of the two daughters between the date you were in Japan in 1940, and the time this deed was executed in 1941?

A. I don't have any recollection of such a conveyance by him to his daughter.

Q. And if there had been one, they would undoubtedly have come to you to prepare the papers, wouldn't they?

A. Well, I hope so; I don't know. Maybe they would have gone to somebody else.

Q. What I am trying to get at, Mr. Murakami—
and I think you understand, too——

A. I understand.

Q. Is that in 1940 Yotaro Fujino owned the land referred to in Exhibit H and no other, and that when he conveyed the land to Kaname he was conveying all his real estate holdings in Hawaii?

A. Yes, that is my understanding; all of his real property in the Territory he was conveying to his son.

Q. And when you talked to him in Japan he spoke of conveying all his real estate to Kaname, and none to the two daughters? [390]

A. No, he did not speak of conveying any land to his two daughters.

Mr. Jansen: I think I have it cleared up now.

(Testimony of Robert K. Murakami.)

Redirect Examination

By Mr. Beebe:

Q. When you have a son, it would be rather unusual for a Japanese, Mr. Murakami——

A. I don't catch that.

Q. To convey land to a daughter, when he had a son, would be rather unusual in Japan, wouldn't it?

A. Very unusual as far as old-time Japanese are concerned.

Mr. Beebe: I think that is all, Mr. Murakami.

Recross-Examination

By Mr. Jansen:

Q. Do you mean they disinherit the daughters, as a rule?

A. Yes, you marry out and you don't get anything. If the old man makes a will he leaves it to the son and leaves out the daughters.

Q. You mean under the law of Japan?

A. No, the mental—the way they take it, the family tradition; the woman goes out of the home.

Q. Was that the reason he had this stock issued to the daughters, to distinguish between land and stock? [391]

A. Sometimes they do.

Q. Sometimes? A. Yes.

Q. Do you think there was a distinction made in this case?

(Testimony of Robert K. Murakami.)

A. I think so. I think he had considered all angles—which I would tell you—I ordinarily tell them, “Why don’t you give something to the girls, too,” and in this particular case I am sure that that thing came because of my suggestion when I was talking to him in Japan.

Q. You mean he issued the certificates of stock to the girls and took the notes back?

A. No, I mean, giving the shares to the girls too, to some extent.

Q. Was not Mr. Fujino a more modern person, having lived in the Territory all his life, or most of his life?

A. Yes, some. I would say. He had acquired some of the notions about inheritance and giving property and so forth, yes.

Q. Do you think the fact that Kaname was single and would not need a wife to sign a deed, if there was to be one—might have had something to do with it, whereas the daughters would have to have their husband’s sign?—

A. No, I don’t think so.

Q. If they had received the real estate?

A. I don’t think so. [392]

Mr. Beebe: The daughters would not have had to have their husband’s sign; not in our Territory.

Mr. Jansen: Doesn’t the husband have some right of dower the same as the wife?

A. No, I think the statute reads that the husband has a courtesy right only when he dies.—

Q. When she survives? If the husband survives the wife, his right of courtesy would also survive?

A. Yes

(Testimony of Robert K. Murakami.)

Q. And if the——

A. If he makes a conveyance during the time, under our law; that is the way we interpret it.

Q. So that you don't think that matter entered into it?

A. No, I don't think Mr. Fujino had any such ideas.

Q. He just did not want to give any of the land to his daughters? A. I am sure about that.

Mr. Jansen: I think that is all.

Mr. Beebe: That is all.

(Witness excused.)

The Court: We will stand adjourned until 1:30 o'clock p.m.

(Whereupon adjournment was taken until 1:30 p.m., November 7, 1946.) [393]

Honolulu, T. H., Thursday, November 7, 1946
1:30 o'Clock P.M.

The within-entitled matter came duly on for further hearing on Thursday, November 7, 1946, at 1:30 o'clock p.m., all parties being present as before, whereupon the further following proceedings were had and done and testimony taken:

(Off-the-record discussion between Court and counsel with regard to the calling of certain witnesses.)

The Court: Are you parties ready?

Mr. Beebe: Ready.

Mr. Jansen: We are ready. May it please the Court, I had intended to introduce these as exhibits, but we had not decided completely on the translations or agreed upon them at the time. I have shown them to Mr. Beebe. Do you agree that they are substantially correct? We have one other letter that we are in the process of translating now, and that will come in later. I will offer these.

The Court: Any objection?

Mr. Beebe: No objection, if your Honor please.

The Court: Very well. They may become the Government's exhibits next in order.

Mr. Jansen: May I suggest the original Japanese be given a number, and the translation have the same number with an "A" after it, and so on.

The Court: Yes. They will be marked 7 and 7-A, and 8 and 8-A. Which is 7?

[Defendant's Exhibits 7-A and 8-A set out on pages 357-458.]

Mr. Jansen: 7 is the letter from Fujino in Japan to the Oahu Junk Company, and 8 is the cablegram.

The Court: The cablegram is between the same parties?

Mr. Jansen: Between Yotaro and the Oahu Junk Company; to the Oahu Junk Company. It is presumably from Fujino. I don't think it has any signature. From Fujino, Japan, Tokio, to the Oahu Junk Company, and the date is March 23, 1941, and it is marked in pencil "Received March 24, 1941, at 8 o'clock in the morning," "8 a.m."

The Court: Let me review that. What is the gist of the letter, and I am trying to find out where you refer to it.

Mr. Jansen: The letter refers to the monthly report, and it reads: "I am glad to know that everybody is well. Fortunately we are all well so please feel at ease. I read with thanks the financial report and others up to December 31st of last year, recently sent to me, of my private enterprise which was later incorporated. You may be busy but will you please let me know as in the past years the monthly business condition each month to the necessary extent on the formerly printed form. Please excuse my haste writing. In closing I pray good health of you all."

The Court: And the cablegram is what?

Mr. Jansen: The cablegram, may it please the Court, is [395] with reference to the aircraft metal, for the aircraft company, and the cablegram reads: "The last user of the new iron was Sinko Aircraft Kogyosha 291 Azukizawa, Shimura, Itabashike, usage it for repairing of factory warehouse."

I might say, if it please the Court, we also have a letter that refers to the last item; that is, the new metal for aircraft factor, that they are in the process of translating now.

The Court: They are two different things?

Mr. Jansen: Yes. This is the cablegram.

The Court: Where is that radiogram that you asked the witness if he sent in reply to the request to make the plaintiff president of the corporation?

Mr. Jansen: Oh, he admitted, if it please the court, that in October he sent a cablegram in which he said Kaname has been elected president, please fill out deed, but we could not quite agree whether they had sent the stock certificate; it was his recollection that the cablegram also said "Received your stock certificate" too; they say that they had sent it.

The Court: You are not offering that in evidence?

Mr. Jansen: No.

The Court: As long as we are cleaning up details, how about Mr. Murakami?—

Mr. Beebe: I was going to recall Mr. Murakami to explain that telegram, and I have the note. [396]

ROBERT K. MURAKAMI

recalled as a witness for the plaintiff, having heretofore been duly sworn, testified as follows:

Direct Examination

By Mr. Beebe:

Q. Mr. Murakami, during the noon-hour did you endeavor to ascertain the date upon which you made the loan to Yotaro Fujino?

A. Yes, I did.

Q. Did you secure the original note marked "paid" and so forth? A. That's right.

Q. Where did you obtain that?

A. This came from the Oahu Junk Company. I tried my files, but only had a few minutes after lunch, but I could not find anything. I believe I

(Testimony of Robert K. Murakami.)

have a record of it. This is the original note. (Indicating)

Q. The loan was made on what date?

A. July 1st, 1938.

Q. The amount?

A. Five thousand dollars.

Q. When was that obligation paid off?

A. February the 11th 1942; in my own handwriting.

Q. And was that paid in a lump sum or paid from period to period? [397]

A. Lump sum payments.

Q. Mr. Murakami, there has just been introduced in evidence a telegram dated,—well, it has stamped on it 41, March 23, p.m. 11/34, the translation being: “The last user of the new iron was Sinko Aircraft” etc. Now will you tell the Court the conditions that existed at that time, and the reason, if you know, for this wire?

A. This telegram,—My recollection is—

The Court: May I interrupt, first. Could he tell us what is meant. I do not understand.

Mr. Beebe: This will explain it, if your Honor please.

A. As I recall, the whole transaction, at that time,—that is, about March of 1941, shipments of commodities such as scrap steel, iron and so forth, to Japan, had to be made only pursuant to an export license issued by the Department of State, if I am not mistaken, in the United States Department of State here, and the Oahu Junk Company,

(Testimony of Robert K. Murakami.)

Limited, asked me and in turn I asked our corresponding lawyer in Washington, Mr. Henry F. Butler, to attend to that matter of filing an application for a license, an export license, and in the course of the communication between Mr. Butler's office and my office, which always related to the Oahu Junk Company, Limited, we had to get the name of the ultimate consumer of scrap or iron which was sent to Japan, and also the address, and for what purpose that material was to be used, and that [398] information had to be included in the application to the State Department for an export license. We had received a wire from Mr. Butler in Washington,—I have the original of that radiogram here, which says "Must know ultimate consumer and purpose for which proposed shipment required before making a license application."

Q. Now the date of that telegram is what?

A. It looks like March 2; it may be March 21,—and I rather think it is March 21, 1941; 7:04 a.m. I think it is also "21" because the previous communication about this is March 11, from us to Mr. Butler's office, and then I recall discussing the matter with Mr. Yamamoto and perhaps Mr. Tsuda.—I don't know whether both came; I know Mr. Yamamoto did come, and we formulated the wire to be sent to Japan for this information, and I believe this was the answer that we got, because on the 24th of March 1941 we in turn relayed that information to Mr. Butler. We addressed to him—Ultimate consumer of bars and flat iron Shinko

(Testimony of Robert K. Murakami.)

Aircraft, Kogyosha 291, Shimura, Azukizawa, Itabashi-ke, Tokio, for repairing shop warehouse. Murakami." That was addressed to Mr. Butler. That is the code address in Washington, D. C. So that is the way, I recall, that whole transaction.

Q. So the two wires that you have just referred to are connected with Defendant's Exhibit 8 in the fashion that you have just described or indicated? [399] A. That's right.

Q. Will you remove those from your files so we can introduce them?

A. This is the first one, and this is the second one. (Producing documents.)

Mr. Beebe: I will ask, if your Honor please, that the telegram from Butler first referred to, the same being dated March the 21st, be received in evidence and given the first number, and the telegram from Murakami to Reltub,—Butler spelled backwards, I guess, be received in evidence and marked with the next subsequent letters.

The Court: Yes. The first would be "Q" and the next one "R."

(Radiograms referred to are received in evidence and marked: Plaintiff's Exhibit "Q" and Plaintiff's Exhibit "R," respectively.)

[Plaintiff's Exhibits Q and R set out on pages 527-528.]

Q. I note, Mr. Murakami, that Plaintiff's Exhibit "Q" is addressed "Benkumi." What is that?

A. That used to be our short-cut address, registered with the local telegraph office.

(Testimony of Robert K. Murakami.)

Q. By "our," you mean the firm?

A. I mean the firm of Murakami and Marumoto.

Q. And with reference to Plaintiff's Exhibit "R" the address is "Reltub, Washington, D. C." What does that mean?

A. Reltub, Washington, D. C., is the registered code address [400] of Mr. Butler's firm, or I think he was an individual—I don't know now. It is "Butler" spelled backwards, and that is his cable address.

Mr. Beebe: That is all.

Cross-Examination

By Mr. Jansen:

Q. Did you have a lot of such transactions during 1941?

A. Not too many, but I believe that transaction there was the only one, or two or three license applications, that I remember.

Q. Was the license in that case granted?

A. As I recall I think here the license was denied. I have this advice from Mr. Butler.

Q. Who handled those matters after Mr. Yamamoto left?

A. I don't believe we have any further applications after that to attend to.

Q. Does your file indicate whether you have any or not?

A. I think it indicated that same transaction we are talking about, and then after that there is none.

(Testimony of Robert K. Murakami.)

Q. There were none? A. None.

Q. What about other business matters for which they would need a lawyer, who came to see you after Mr. Yamamoto left?

A. Mr. Tsuda, Mr. Tsutsumi, both sometimes; one at a time at times. [401]

Q. After Yamamoto left did they consult with you about letters that they had received from Japan?

A. I have a recollection about wires more than letters, after that, if I recall. I don't think there were so many letters after that.

Q. You saw the letters that Kaname had brought down from Yamamoto's desk? A. Yes.

Q. You recall that there were more than a dozen letters, after Yamamoto left?

A. I don't recollect that, whether there are more than a dozen.

Q. I think so.

A. As a matter of fact, I didn't notice the date. I think it was all during the period—I didn't even notice that there were more than a dozen after Yamamoto left.

Q. As a matter of fact, most of the correspondence that Kaname produced was correspondence that accumulated after Yamamoto left?

A. If you will let me see that.

Q. They are working on that now. We are not through.

(Testimony of Robert K. Murakami.)

In connection with this courtesy for the property we were discussing before lunch. If a wife owns real estate and she dies without leaving a will, the real estate passes to her husband under the law of Hawaii, doesn't it? [402]

A. No, it passes to her heirs.

Q. Well, suppose she has no children?

A. No children? My recollection is that it goes one-half to the wife and one-half to the parents.

Q. If she has children?

A. It goes to the children, subject to the courtesy.

Q. The courtesy interest of the husband is how much?

A. A life estate; one-third; a life estate. Let's see, now?

Q. Is it a life estate in the home, and one-third of the rest?

A. No, I don't think the husband has that so-called right to the homestead.

Q. What is it, a life estate or a third?

A. For instance, if it is income property, as I recall it is one-third income for life, so it will be—it is only a life estate, that I know, and that this is really one-third of the net.

Q. And upon his death who does it go to—upon the husband's death?

A. Then it goes to the children.

Q. If the husband survives the wife; in every case he has a courtesy right in the wife's real estate?

(Testimony of Robert K. Murakami.)

A. Yes, that's right, but what I am trying to tell you, if there was a conveyance without the husband joining, during [403] the lifetime——

Q. Yes, I understand that, during the lifetime. I wanted to know what the situation would be if the wife would die and should be seized of this property.

The Court: That is all pre-community property law?

Witness: Yes, that is all before the community property law came in.

Q. That community property law is of recent origin?

A. That became effective in July, 1945.

Q. So that the other law would apply?

A. Yes.

Q. And this note, signed Yotaro Fujino, is dated July 31, 1938—signed by the two attorneys-in-fact?

A. Yes.

Q. It had one year after date? A. Yes.

Q. Was it ever renewed?

A. No, not in the sense that a new note was made. I just let it ride.

Q. You just let it ride?

A. Yes. In other words, I think they asked me whether I wanted the money, and I said it is all right so long as you pay me, I don't have particular need for it, and I was willing to let it ride.

Q. Did they pay interest regularly? [404]

A. Regularly, they do.

(Testimony of Robert K. Murakami.)

Q. You did not endorse the interest payments on the notes? A. No, I did not.

Q. Don't you make it a practice of doing it, or don't you loan much money?

A. No, I don't loan much money. I will when we have clients behind with money or interest——

Q. You didn't do it in this case?

A. No, I knew they paid the interest right on the dot, or a few days ahead, and there was no delinquent interest, and I didn't make the notation.

Q. Wouldn't it be good business to endorse interest payments on that note, in case something happened to you? A. I believe so.

Q. You didn't do it? A. No.

Q. You found this note among the papers of the Oahu Junk Company?

A. No, Mr. Tsutsumi, I told him to check up. We had about five minutes, and I didn't have a chance to go over my files very thoroughly; I just brought this down, and all the rest I had were here, and I haven't had a chance to go over them.

Q. This note was not in your possession; it was in the possession of the Oahu Junk Company, was it not? A. Yes, that is correct, it was. [405]

Mr. Jansen: No further questions.

Mr. Beebe: That is all.

(Witness excused.)

Mr. Beebe: I understand Mr. Jansen is willing to admit that Mr. Edmondson of our office, Mr. Harry Edmondson of our office, if he were called would testify that we are and were during the year 1940 attorneys for the Bishop National Bank of Hawaii at Honolulu, and that he as attorney for the bank prepared Exhibit "E," being the power-of-attorney from Yotaro to Tokuichi Tsuda and Yasuo Tsutsumi which was executed in Japan on the 20th day of February, 1941—on December the 16th 1940. And that also he, as attorney for the Bank, prepared Exhibit "G," which is the mortgage of the 13th day of March, 1941, on December the 5th 1940.

Mr. Jansen: There is one other question I was going to ask you in connection with that, that question being this: Is it customary for your office, when a person makes an examination and requests an opinion regarding the transaction, the title and so on, and then to prepare the necessary documents for the bank? I mean, is the examination made first?

Mr. Beebe: I should say that that is customary. Now I didn't ask about this particular thing, but the custom in our office universally is that if the bank is to make a loan on a piece of property we would obtain or have given us the search of title made by some abstractor or abstract company, and we [406] go over that search of title. We have, as you perhaps know, no system such as you have on the mainland of abstract conveyance or anything of that kind.

Mr. Jansen: But you do arrive at an opinion regarding the transaction, and do you give written opinions to your client, like a bank, or estate, and say that the title was in a state of so and so and subject to so and so?

Mr. Beebe: That is not universal practice. In some instances we do, particularly if we find a defect in the title; otherwise if the title, according to the certificate that we get from the abstractor, shows title in the mortgagor, why we just draw it up.

Mr. Jansen: When you are satisfied that good title is in the mortgagor you prepare the mortgage and you submit it to the bank, but you make an examination first?

Mr. Beebe: That's right, when it is an original loan. Now with reference to this particular thing, I cannot answer that because there was an obligation that was already in existence, and this is a mortgage to secure an existing obligation, but I will try to ascertain from Mr. Edmondson what was done, or bring him up here.

Mr. Jansen: I would like to know that one thing. It won't be necessary to bring him up here, if you will be in position to say that he will testify that he made the examination first, and after he made the examination and was satisfied [407] with the title he prepared this mortgage, or whatever he says he did.

Mr. Beebe: Yes, I will do that.

I might say to your Honor that I am not going to accumulate testimony through Mr. Tsutsumi; I am just going to put him on the witness stand for a brief examination

HARRY YASUO TSUTSUMI

was called as a witness for the plaintiff herein, and being first duly sworn, testified as follows:

Examination

By the Court:

Q. Will you state your full name.

A. Harry Yasuo Tsutsumi.

Q. How do you spell that name?

A. T-s-u-t-s-u-m-i. (Spelling)

Q. How old are you? A. Thirty-seven.

Q. You reside herein Honolulu? A. Yes.

Q. And what is your occupation?

A. Assistant manager of Oahu Junk Company.

Q. Are you a citizen of the United States?

A. Yes.

Q. Exclusively? A. I consider exclusive.

Q. Well, are you? You either are or you are not.

You consider yourself exclusively a citizen of the United States. [408] Is there some other tie?

A. I have a dual, I think; I am not sure.

Q. You think you are a dual citizen?

A. Yes.

Q. You are not sure? A. Yes.

The Court: You may take the witness.

Direct Examination

By Mr. Beebe:

Q. Where were you born?

A. Wahiawa, Oahu, T. H.

Q. When? A. May 24, 1909.

(Testimony of Harry Yasuo Tsutsumi.)

Q. You said you were not sure whether you were a dual citizen or not? Do you mean by that you do not know whether your father registered your birth in Japan? A. No, I do not know.

Q. You do not know? A. No.

Q. If your father registered your birth in Japan that would make you a dual citizen, would it?

A. Yes.

Q. Is that your understanding of it?

A. That's right.

Q. So far as you are concerned, you do not know? [409] A. Yes.

Q. Have you ever been to Japan?

A. No, I have not.

Q. So you don't know anything about the family records there in your prefecture, is that correct?

A. No, I do not.

Q. And you are employed by the Oahu Junk Company? A. Yes.

Q. And have been employed by the Oahu Junk Company for how long?

A. Well, since August 13, 1928.

Q. August the 13th 1928? A. Yes.

Q. At that time what was the status of the Oahu Junk Company? That is, was it a corporation, copartnership, or what was it?

A. No, it was an individually owned—by Mr. Fujino, doing business under the name of Oahu Junk Company.

Q. And when you say Mr. Fujino, whom do you mean? A. Yotaro Fujino.

(Testimony of Harry Yasuo Tsutsumi.)

Q. Then you have been constantly employed since that time by the Oahu Junk Company, either when it was operated by Yotaro Fujino in his individual capacity or since it has been a corporation, is that correct? A. Yes. [410]

Q. And you, of course, knew Yotaro Fujino?

A. Yes, I do.

Q. Did you know Chiyono Fujino?

A. Yes.

Q. And do you know Seitaro Yamamoto?

A. Yes, I do.

Q. Yamamoto, when did you first become acquainted with Yamamoto?

A. When I first was employed at the Oahu Junk Company; that was August, 1928.

Q. Was Yamamoto then employed?

A. Yes, he was there ahead of me when I went to work for the company.

Q. Now tell the Court what the relationship was between Yamamoto and Fujino. By that I do not mean blood relationship—business relationship and so forth and so on.

A. Well, Mr. Yamamoto as I can recall, he was an advisor in business, and I am sure it was also in personal affairs to Mr. Fujino.

Q. How long did that continue?

A. Up to his death in 1941.

Q. Now, Mr. Fujino and Mrs. Fujino went to Japan, did they not?

A. Yes. That was in February, 1935.

Q. February of 1935? A. Yes. [411]

(Testimony of Harry Yasuo Tsutsumi.)

Q. And after they went to Japan what was the relationship that Yamamoto maintained towards the business?

A. Well, he was still the advisor to Mr. Yotaro Fujino, as well as Mr. Tsuda and I as his power-of-attorney; he was advisor to us, also.

Q. Did he continue in that capacity up to his death? A. Yes, that's right.

Q. When Yamamoto went to Japan what were his intentions as to remaining in Japan or returning to Hawaii?

A. No, he took a trip for business, and he was supposed to be back within a short time, about six months, I think the length of time he was supposed to leave the Territory.

Q. And did he die en route from Japan to Hawaii? A. Yes, that's right; at Hongkong.

Q. Now you were the same Tsutsumi who is referred to in various powers-of-attorney?

A. Yes.

Q. That have been introduced in evidence?

A. Yes.

Q. The first powers-of-attorney ran to you and Mr. Tsuda, and were drawn sometime in the year 1935, is that correct? A. Yes, right.

Q. And that was about the time that the Fujinos left for [412] Japan? A. Yes.

Q. And the second power-of-attorney was 1940, or thereabouts, is that right? A. 1941.

Q. And your haole name is what?

A. Harry.

(Testimony of Harry Yasuo Tsutsumi.)

Q. I ask that, because Mr. Tsuda at some place in his testimony referred to "Harry." Do these power-of-attorneys refer to "Harry"?

A. No, they do not.

Q. Your Japanese name, first name, is Yasuo?

A. Yes.

Q. And like a lot of Japanese boys born in the Territory you adopted——

A. No, I have it legalized. I did legalize it; that name.

Q. That is, you had the name "Harry" legalized for you? A. Yes.

Q. By the Governor of the Territory, or were you registered as Harry at birth?

A. By the Governor.

Q. Now can you tell the Court anything about the handling of correspondence between Japan and the Oahu Junk Company?

A. When Mr. Fujino left the Territory I think it was [413] about a week and one-half or two weeks, I could not remember what date it was, but I had a conversation with Mr. Yotaro Fujino at that time, and he asked me that he is going to let me be one of his power-of-attorney and I rejected that on the ground that I did not have enough experience in business, and Mr. Fujino told me at that time that since Mr. Yamamoto would be here in—acting for Mr. Fujino, since I could consult Mr. Yamamoto and Mr. Tsuda was my senior employee there, as long as I could cooperate with them and

(Testimony of Harry Yasuo Tsutsumi.)

do the things that should be done, why that is all that was necessary, and I spoke to Mr. Yotaro Fujino that Mr. Yamamoto was there, and he did not answer my question at that time, but I am sure he told me that—that he told, but I am sure he didn't say anything to me, but he said something like if Mr. Yamamoto won't or didn't drink liquor as he did—I kind of recall that is what he mentioned at that time, saying if Mr. Yamamoto did not have the habitual drink—if he was not a habitual drinker, I am sure Mr. Yamamoto might have taken my place at that time.

Q. Well, now, my question was: How was correspondence handled after the Fujinos went to Japan?

A. All the correspondence in business, or any business came through the Oahu Junk Company, but it was handled by Mr. Yamamoto because he did all the writing and reading of the Japanese character.

Q. And how about Fujino, could Yotaro Fujino write in [414] English?

A. No, Mr. Fujino did not write in English.

Q. Then the correspondence from Japan to the Oahu Junk Company was done in Japanese?

A. Yes, in Japanese.

Q. Then when the letter was received, or a telegram was received from Yotaro Fujino in Japan, where would that go?

A. It comes to the Oahu Junk Company, and in turn we will either send it by somebody, some of

(Testimony of Harry Yasuo Tsutsumi.)

our boys, or somebody will take it up to his home, because most of the cases he was not at the store, at the office.

Q. Then would he tell you the contents of it, and so forth?

A. Yes. It was the customary practice that we were quite busy in our work, so usually he would just tell us the main items that were in the letter, and we did not bother, you know, to tell the whole letter, and even if he does read it we would not understand very much about it, so he just pick the items that are in there and let us know what they are.

Q. Do you read Japanese characters?

A. No, I cannot.

Q. What is that?

A. I cannot read—so that I could understand the full meaning of it.

Q. Did you go to Japanese language school?

A. Yes. [415]

Q. While you were a boy at Wahiawa?

A. No, I lived most of my life at Pearl City; not at Wahiawa.

Q. Did you attend Japanese language school at Pearl City? A. Yes, I did, a little.

Q. How long a period of time, would you say?

A. Five or six years.

Q. Six years. And was Japanese script or the writing of Japanese script taught you there?

A. Yes, they did.

(Testimony of Harry Yasuo Tsutsumi.)

Q. Do you know how many characters there are in Japanese? A. No, I cannot tell you.

Q. Well, do I understand then that you have no facility in the reading of Japanese script; at least written by an old country Japanese?

A. Yes, I do not.

Q. You might understand pidgen-Japanese—is that about the answers? A. Yes, that's right.

Q. So then you and Tsuda relied upon Yamamoto to translate and tell you the contents of the correspondence that originated in Japan, is that correct? A. Yes. [416]

Q. And, conversely, when you had to send anything to Japan to old man Fujino what happened?

A. Usually Mr. Yamamoto does all the writing for us.

Q. Well, you say "usually." Were there instances where he did not do the writing, and someone else did the writing, if you recall?

A. No, in Japanese he does everything in that; he does the correspondence. There are some cases we used to send some wire and all that, in plain English. We could do that ourselves, so we did that.

Q. In plain English, did you say?

A. Yes. With this firm that we used to handle some cement, and that company had correspondence in English, and so we did.

Q. I see. In some instances you sent telegrams to Japan that were in English? A. Yes.

(Testimony of Harry Yasuo Tsutsumi.)

Q. Now what about the period when Yamamoto was in Japan, just prior to his death; was there any necessity for carrying on correspondence between this office and Japan?

A. No, we had no more of that—We have to—I don't recall any correspondence from this end.

Q. Well, there were some questions put to Mr. Tsuda about some two thousand dollars that was sent to Yamamoto in China, I believe it was. Do you recall anything about [417] that—Hongkong?

A. Oh, yes, that might have been sent, because I think there was something to be bought from the other end, to be shipped to us, to our company here.

Q. That must have been the subject of correspondence, wasn't it, the two thousand dollars that was mentioned, or was it agreed, definite, that you would send him the two thousand dollars? I am just directing my attention to this, because it was—(int.)

A. I don't recall how the thing came. It should have been a cable, maybe, because after Mr. Yamamoto left I cannot recall, it might be some letters that came in, but it could not be very much, because he was on the other end, and he can get in touch with the other corporations that do business with us here.

Q. When did he go?

A. That was April, 1941.

Q. And Kaname arrived here in May of 1941?

A. Yes.

(Testimony of Harry Yasuo Tsutsumi.)

Q. Does Kaname write in Japanese?

A. I think he writes in Japanese.

Q. Now at the time of the incorporation or prior to the time of the incorporation of the Oahu Junk Company do you recall ever calling at Yamamoto's home at any time?

A. Yes, sometime in September, I imagine it was, or [418] in October. September or October, Mr. Tsuda told me that Mr. Yamamoto called on the 'phone that I should go together to his home.

Q. Did you go together to his home?

A. Yes, to his home.

Q. And what took place at that time?

A. Mr. Yamamoto had a letter and he said that Mr. Fujino want to proceed with the incorporation, and another thing was that he want to give the property to Kaname, and if my recollection is right I think he mentioned something about the employees' loan to be wiped out.

Q. That is the first time I have heard about that.

A. Yes, that was in there.

Q. By the way, did you owe the Oahu Junk Company any money?

A. No, I did not, at that time, but my father did.

Q. Did you see a letter that Yamamoto had at that time?

A. Yes, I saw the letter, but of course we did not read inside to the letter, but the letter was on his desk at that time. That was Mr. Fujino's writing.

(Testimony of Harry Yasuo Tsutsumi.)

Q. Would you recognize Yamamoto's handwriting.
A. Yes, I would.

Q. I wish you would examine this Japanese script, underneath the typewritten portion of Exhibit 8, Defendant's Exhibit 8, and I ask you if you recognize that script as the handwriting [419] of anybody?

A. Yes, this is Mr. Yamamoto's handwriting.

Q. And tell me whether you recognize the handwriting beneath the Japanese script.

A. Yes, that is Mr. Yamamoto's handwriting, also.

Q. Are you sure of that? A. Yes.

Q. Prior to this trip of Yamamoto's in 1941 had he made any other trip to Japan on company business?

A. Yes, I think it was sometime in 1939, in 1939, I think, he had a trip there.

Q. And was that on company business?

A. Yes, on company business.

Q. And that was before the incorporation, of course?
A. Yes, that was before.

Q. How long did he remain away at that time?

A. At that time I think it was not very long; maybe that was three or four months, as I recall.

Mr. Beebe: I think that is all.

Cross-Examination

By Mr. Jansen:

Q. Mr. Tsutsumi, what did you and Tsuda do with all the cables and letters that you received after Yamamoto left?

(Testimony of Harry Yasuo Tsutsumi.)

A. We left it on Mr. Yamamoto's desk, and I think one of the employees might have put it away.

Q. Well, didn't you answer that?

A. No. When Mr. Yamamoto left he told us that he would be in there at the firms all over the place where we used to do business.

Q. He would be there?

A. So if there is anything that we have to do, to do it right away, but otherwise refer it—or leave it until he come back.

Q. Well, would you leave cables until he came back?

A. Cable? That depend on what kind.

Q. What date did Mr. Yamamoto leave for Japan? A. May, 1941.

Q. I thought you said it was April, 1941?

A. I am sorry. April, that's right.

Q. What date in April? A. April 4th.

Q. April 4, 1941? A. That's right.

Q. So calling your attention to a cable dated March 26, 1941, that cable was here when Mr. Yamamoto left, is that right?

A. That's right.

Q. All cables that came in that were addressd "Junko, Honolulu" they came to the Oahu Junk Company? A. Yes. [421]

Q. Now, here is another cable, dated June 24th, 1941, addressed to the Oahu Junk Company. Was Mr. Yamamoto here then? A. No.

Q. What did you do about that?

A. Well——

(Testimony of Harry Yasuo Tsutsumi.)

Q. Here is another one dated July 3, 1941. After Mr. Yamamoto left in April he never did come back, did he? A. No.

Q. What did you do about this one dated July 3d. That is also the Oahu Junk Company, is it?

A. Yes.

Q. You see, when you nod your head, we have no answer of "yes" or "no." What did you do about that?

A. I don't recall on these cables, because I had my own paint department and scraps, or anything like that, I never used to do very much on this work.

Q. You and Mr. Tsuda were the attorneys-in-fact. He was the manager and you were the assistant manager?

A. Yes, but this is only for business, and it was not anything concerning his personal affairs or things.

Q. Well, somebody handled the business, didn't he?

A. Yes, Mr. Tsuda used to do most of the things.

Q. Well, we have here another one, July 7th. You got that one, didn't you? [422]

A. Yes—August the 8th.

Q. Here is one in English dated August 9th. Did you do anything about that?

A. Well, we let Mr. Yamamoto know about that.

Q. That was in connection with Mr. Yamamoto's sickness? A. Yes.

Q. And his death is another one? A. Yes.

(Testimony of Harry Yasuo Tsutsumi.)

Q. You did take care of this? A. Oh, yes.

Q. Here is another one, August 10th; that is also to Yamamoto, and another one, August 13th; four of them there, all about Yamamoto, aren't they? A. Yes.

Q. You took care of those?

A. Yes, we did.

Q. Now we will go on. Here is one dated October 15th. Did you do anything about that?

A. Yes.

Q. Of 1941? A. Yes.

Q. What did you do about that?

A. We did let these people know.

Q. You took care of that? A. Yes. [423]

Q. But all of those other cables I have shown you, from June to August, you said you had nothing to do about them at all?

A. I don't recall doing anything of these here.

Q. How about this one dated May 1, 1941; did you say anything about that? That is the one where Yotaro asked you to get those papers for him so he could go to the Philippines.

A. No, I did not take care of these things.

Q. Who did? A. Mr. Tsuda.

Q. He actually took care of them?

A. Yes.

Q. So you did actually execute, or take care of the correspondence, some, there?

A. Yes, we did.

Q. Here is one dated July 14th. That has to do with the two thousand dollars. You took care of that? A. Yes, we did.

(Testimony of Harry Yasuo Tsutsumi.)

Q. Mr. Tsuda, did you? A. Yes.

Q. Here is another one dated May 25th. That has reference to their trip to the Philippines and consular identification. Mr. Tsuda took care of that? A. Yes.

Q. Another one dated December 31—Wait, that is 1940. All of those cables, as a matter of fact, I have shown to [424] you, were initially handled by Mr. Tsuda at least, or something was done to them?

A. Yes.

Q. Is that right? A. Yes.

Q. And he took care of the instructions that were contained in them, didn't he?

A. I could not say whether everything was done, because I don't recall.

Q. While you were there—You were one of the attorneys-in-fact, and you were also assistant manager. Didn't you know, while you were there—didn't you know that those matters were all taken care of? Somebody had to do that business.

A. Yes, maybe somebody did, but I don't recall myself taking care of these things.

Q. But you know that they came in?

A. Yes.

Q. You were there?

A. Yes, sometime I was around, so I could know, but otherwise I did not know.

Q. Now how about all these letters that I have here; about 13 letters. You look at them and tell me if anybody took care of these. These were all after April 1st, 1941.

A. Well, I don't recall any of these letters.

(Testimony of Harry Yasuo Tsutsumi.)

Q. Well, Mr. Tsutsumi, you are not trying to give us the impression that cables would come in at the rate that you have seen them here in court, and that have been shown to you, and that nobody would take care of it for you?

A. No, somebody might take care, but I myself.

Q. Somebody, in fact, did take care, didn't they?

A. I really cannot say, because I did not take care of these myself.

Q. Then you don't know anything about it. You said before nobody took care of them, that they were put on Yamamoto's desk. That is not so. You do not know anything about that?

A. Along with that, letters that used to come in, I know, because since Mr. Yamamoto was still here if he is come into the store sometime we would have to call him up, if he was coming to the store, otherwise we have to take it up, otherwise we leave it on his table here.

Q. I understand, before he left. But after he was gone to Japan somebody had to take care of this correspondence. You didn't just put it on Yamamoto's desk or stick it in his drawer?

A. No, it was somebody must have taken care, yes.

Q. Certainly.

A. And some of them I knew about these, Mr. Yamamoto's debts and all that; I knew about them.

Q. There are four with regard to them?

A. Yes.

(Testimony of Harry Yasuo Tsutsumi.)

Q. And there are about a dozen or more with regard to other things, and you know that somebody was there in the office and actually took care of those matters, didn't they?

A. Yes, I think somebody did.

Q. And the same is true of the letters. They did not just stick them away without reading them and taking care of them; somebody there in the office took care of them, didn't they?

A. Yes, they must have been.

Q. Certainly.

Mr. Jansen: The two letters, counsel, that I had reference to before, when we offered the other two exhibits, were, 1, a letter dated March 17th from which we made just an excerpt, and another dated March 24th. I wish you would look at them and see if the asterisks were—the asterisks indicate a substantially correct translation.

Q. So after Mr. Yamamoto left there were at least a dozen replies or a dozen letters that came into the business, and they related to the business of the company, and I am not talking now about the time before Mr. Yamamoto's death. They relate to the business of the company, and Mr. Yotaro Fujino, and somebody in the office took care of them. That is right, isn't it? [427]

A. Yes, maybe.

Q. Now, Mr. Tsutsumi, going back to October or November, 1940, when you were at Mr. Yamamoto's house——

A. Yes.

(Testimony of Harry Yasuo Tsutsumi.)

Q. You told us on direct examination that Mr. Yamamoto spoke of only three things, very briefly, at least the way you tell us. A. Yes.

Q. One was the incorporation; one was the land, and the other one was about forgive the employees' debts. A. Yes.

Q. Well, now, did Mr. Yamamoto at that time explain in detail?

A. No, and I haven't heard the details statement.

Q. Did he just say "Mr. Fujino is going to incorporate; give the land to his son, and forgive the debts"?

A. Yes, the incorporation was to proceed.

Q. The incorporation was to proceed?

A. Yes.

Q. But he did not explain what Yotaro had said, that so much stock should be issued, or such and such should be transferred to the corporation?

A. No.

Q. Or any of the details as they were worked out later? A. Yes.

Q. He did not explain any of that? [428]

A. No, I haven't heard.

Q. He just said the incorporation will proceed, with regard to the corporation? A. Yes.

Q. And he just said there will be a deed to the land to Kaname? A. That's right.

Q. And he just said that the debts of the employees are going to be forgiven? A. Yes.

Q. That is all he said?

A. That is all I heard at that time.

(Testimony of Harry Yasuo Tsutsumi.)

Q. Did he at any other time have any letters from Yotaro Fujino that you saw with reference to the details of this transaction?

A. No, I haven't seen any letter, but Mr. Yamamoto was always discussing with Mr. Murakami, and so I knew the corporation was to be incorporated, as I understand at that time, yes.

Q. In October—November, 1940, when you were at Yamamoto's house, do you recall that Yamamoto said that Yotaro wants to keep parental control of the stock; he wants to make sure, that the children do not squander the money?

A. Well, I did not hear at that time. I think that was discussed later, when everything was going to be incorporated, [429] I think.

Q. It was said, though, that the reason for getting the notes back from the children was to keep parental control?

A. Yes.

Q. What do you mean by "parental control"?

A. Well, Mr. Fujino's idea was that, that they do not want the children to just spend foolishly, and that is the main reason, I think it was; I am not sure.

Q. And in the case of Kaname he was going to go to school for maybe two or three or four years, and he wanted to still be able to tell Kaname that he was the father and the business?

A. Later on I am sure Mr. Fujino's intention was to give it to him.

Q. Yes, eventually. That is everybody's intention, I think, to their children, but for the time

(Testimony of Harry Yasuo Tsutsumi.)

being he wanted Kaname to know that he was still the business—— A. Yes.

Q. That he was still the father, and still the head of the family. A. (No audible answer.)

Q. About this dual citizenship, it is not too important, but there is one question. You know that the registration of Japanese children was made here at the Consul's Office, the Japanese Consul's office, when they were born, wasn't it? [430]

A. Yes.

Q. And that is how most of the Japanese here acquired a dual citizenship? A. Yes.

Q. So it would not be necessary to go to Japan to find out whether there was a registration?

A. No.

Q. But you do not know whether you were registered or not?

A. No, I did not even ask my father about it.

Q. Your father is not living now?

A. No, he is with me.

Q. But you have never asked him?

A. No, I did not care to, and it is not necessary for me, anyway.

Q. You assumed that you were; I mean when the Judge first asked you. A. Yes.

Q. You were asked if you were? A. Yes.

Q. You do not have any reason to believe that you were not? A. No.

Mr. Jansen: No further questions.

The Court: Redirect? [431]

(Testimony of Harry Yasuo Tsutsumi.)

Redirect Examination

By Mr. Beebe:

Q. How long did this first conference at Yamamoto's home last, if you recall?

A. You mean at that time?

Q. Yes.

A. It was not very long. I think it is only about 15 or 20 minutes; that is all I can recall.

Mr. Beebe: I think that is all.

Mr. Jansen: No further questions.

(Counsel on both sides request a recess.)

The Court: Very well. We will take a 10 minute recess.

(Recess.)

Mr. Jansen: May it please the Court, two other letters we propose to offer as a part of the cross-examination of the witness Tsuda are: First, the letter dated March 17, 1941, from which we have extracted a translation of only part of the letter, and another dated March 24, 1941, from which we have also extracted only a portion of the letter, and we offer both of these letters in evidence.

The Court: You are offering the full letter, but only a partial translation?

Mr. Jansen: Yes, only an extract.

The Court: It seems to me if you are offering the full letter I should be able to read the whole thing. However, if [432] you only want to offer part of it—

Mr. Jansen: We could have the whole thing translated.

The Court: But you are both in agreement that the only part of it that is significant are the extracts? In other words, you don't want anything in evidence that I cannot read.

Mr. Jansen: Well, perhaps we can shorten it at this time by saying that we propose, and Mr. Beebe will agree, that this letter of March 24th confirms the exchange of telegrams between the Oahu Junk and Yotaro Fujino in Japan, regarding this new iron and that aircraft factory to which Mr. Murakami testified. That confirms the exchange of telegrams.

Mr. Beebe: That's right. It shows what we want in evidence from it; that the original telegram was received, and covers the name and address, and the necessary application for the export permit. This is the telegram which Mr. Murakami said was sent through, and then it confirms the telegram which is Exhibit 8, to the aircraft factory, or about the aircraft factory, and so forth.

Mr. Jansen: And this other letter, the only part I had reference to was that part with regard to new iron, and it does make some reference to it, but I am not particularly concerned about having it in evidence. Perhaps you will be willing to agree that it refers to——

Mr. Beebe: Frankly we cannot make it out. Mr. Murakami asked me what it meant, and I told him I did not know. I have [433] no objection to the

translation going in evidence, as being part of a letter dated March the 24th, 1941.

Mr. Jansen: All right.

Mr. Beebe: Without the Japanese going in at all.

Mr. Jansen: The letter also indicates it was received April 7th or April 8th, and the pencil notations, 4/7 or 4/8 is on there.

Mr. Beebe: I will agree to it.

Mr. Jansen: Then you suggest we offer only the extracts, the translations?

Mr. Beebe: In view of what the Court said, I have no objection to the translation going in, and let the record show that it is a portion of a Japanese letter dated March the 24th, 1941, and that it shows a pencil notation on the bottom of the page "4/7" or "4/8."

The Court: Very well. That, therefore, may become government's Exhibit 9.

(The document offered in evidence, consisting of one sheet, is received and marked: "Defendant's Exhibit "9.")

[Defendant's Exhibit "9" set out on page 458.]

Mr. Jansen: That is all the letters that I have.

Mr. Beebe: At this time, if your Honor please, we have located the original deed from Chiyono Fujino to Kaname, conveying the property to Kaname subject to a life estate, and it is recorded in Liber 1259, at pages 472—It is recorded in [434] the Bureau of Conveyances, on the 13th day of December, 1934.

Mr. Jansen: No objection.

Mr. Beebe: I might as well put it in, and then the whole record is there, if the Court please.

The Court: Very well. It will be received as Plaintiff's Exhibit "S."

(Document offered in evidence is received and marked: "Plaintiff's Exhibit S.")

["Plaintiff's Exhibit S" set out on pages 528 to 531.]

Mr. Beebe: Now this is as far as I can go until tomorrow morning, and we will know about the other matter, of Mrs. Yamamoto.

Mr. Jansen: We also have the problem of Yotaro Fujino. I would like before either side completely rests, and ask at this time, that I have the opportunity to decide whether I am willing to admit that Yotaro would testify as they suggest he would. Of course I don't know what they are going to suggest—but I would like to have the opportunity.

Mr. Beebe: There is no question about that. I haven't gone over the questions, but I will make it the first order of business after we are through with the taking of testimony, to get our proposal out. You can understand that in the main I will be groping in the dark, at least for the financial side of it.

Mr. Jansen: Well, I am not too concerned about that. I am not sure—I do not know exactly what you are getting at [435] there, and I am not sure

that I would be willing to admit what you might claim in regard to that. I have a notion that it is your idea that Yotaro Fujino, in Japan, at all times had plenty of money to take care of himself with, and you would hope to prove that.

Mr. Beebe: Well, let's put it this way——

Mr. Jansen: If that is it, I wouldn't object to that.

Mr. Beebe: I want to protect myself against an argument or a finding by the Court that it would be foolish to assume that a man would transfer all of his property to his son up here, and leave himself, as I said before, in a condition of starvation.

Mr. Jansen: Well, he had \$35,000 we know, in 1938 or 1939.

Mr. Beebe: Yes, there is no question about that. But where that went to, or what he did with it, I don't know.

The Court: I take it you are preparing such a proposal, which will not be ready, apparently, for some days?

Mr. Beebe: We have been working on it.

The Court: I wonder if we could continue this case until that proposal is ready, and bring in the proposal, and your other witness, whom I understand is your last witness?

Mr. Beebe: That would be all right with me, if satisfactory with Mr. Jansen. I know he is out here for these cases, and expects to leave—— [436]

Mr. Jansen: I had an idea it would be ready by this time, because, frankly, I suggested it two weeks ago.

Mr. Beebe: There is no question about that.

Mr. Jansen: And I have made reservations to leave Saturday the 16th, and I expect we will start tomorrow with the other short case, and then the next week on the other remaining three cases, and we probably will be able to finish that one by Friday night—the other one.

The Court: Well, then, maybe we had better take up this other witness tomorrow and get that accomplished, anyway. Do you think Mrs. Yamamoto will be an extended witness?

Mr. Beebe: I don't see how she can be.

The Court: I was wondering myself what she can testify to.

Mr. Beebe: Well, I haven't any hesitancy in stating what I hope to bring out, that a lot of this correspondence was kept up at her home, and that on—right after December the 7th, that everything that was written in Japanese she burned up, as most Japanese did.

Mr. Jansen: And there is the other point, too, that counsel is going to check up with that office.

Mr. Beebe: Yes.

The Court: We will adjourn at this time, and take this case up tomorrow morning at nine.

(Adjourned to 9 o'clock a.m., November 8 1946.) [437]

Friday, November 8, 1946

9:30 o'clock A.M.

The within-entitled matter came duly on for further hearing on Friday, November 8, 1946, at the hour of 9:30 o'clock a.m., all parties being present as before, whereupon the following further proceedings were had and done, and testimony taken:

The Court: Are the parties ready?

Mr. Beebe: Ready, your Honor.

Mr. Jansen: We are ready.

The Court: You may proceed.

Mr. Jansen: Before we start with the next witness, I wonder if I might ask Mr. Tsuda one further question on cross-examination, and Mr. Kaname Fujino.

Mr. Beebe: No objection.

The Court: Very well.

TOKUICHI TSUDA

a witness for the plaintiff herein, having been heretofore duly sworn, was recalled for further cross-examination, and testified as follows:

Cross-Examination

(Resumed)

By Mr. Jansen:

Q. Mr. Tsuda, there is one thing I am not sure that the record is clear on: Until the corporation was formed the land which is involved in this case was carried on the books as [438] property of Yotaro Fujino's business, wasn't it?

A. Prior to the incorporation?

(Testimony of Tokuichi Tsuda.)

Q. Yes. A. Yes.

Mr. Jansen: That is all.

Mr. Beebe: May I have that again?

(Last two questions and answers, as above transcribed, were read to counsel by the reporter.)

Redirect Examination

By Mr. Beebe:

Q. Now, how were those books entitled?

A. Prior to the incorporation?

Q. Yes.

A. That's right, the Oahu Junk Company.

Q. Did his name show any place on the books of the Oahu Junk Company?

A. No, I do not think his name was shown on the books.

Q. Have you any of those books here?

A. No, I haven't got any.

Q. Where are those books?

A. Up there at the office—inside office—because I was not in charge of the books.

Q. You were, or were not? A. I were not.

Q. You were not? [439] A. I was not.

Q. What I am driving at, I notice that a lot of these audited reports show "Y. Fujino, doing business as Oahu Junk Company." Now when you answered his question as you did, did you mean that they were carried as assets of the business of Y. Fujino, doing business as Oahu Junk Company?

(Testimony of Tokuichi Tsuda.)

A. Y. Fujino doing business as the Oahu Junk Company, and my impression is that the Oahu Junk Company was owned by Yotaro Fujino.

Q. Mr. Tsuda, was it also Y. Fujino doing business as Oahu Junk Company and Oahu Lumber & Hardware Company? A. Yes.

Recross-Examination

By Mr. Jansen:

Q. And all of them, those two different designations, junk and hardware, were both included in the corporation later? A. Yes.

(Witness excused.)

KANAME FUJINO

the plaintiff herein, having been heretofore sworn, was recalled for further cross-examination, and testified as follows:

Cross-Examination

By Mr. Jansen:

Q. Kaname, when you went to the Bishop National Bank, [440] just before this trial started, to pick up this deed, Plaintiff's Exhibit "H"—you remember doing that? A. Yes.

Q. Your attorney asked you to go to the bank and get it? A. Yes.

Q. You gave the bank a receipt for that deed, didn't you? A. Yes; took it out.

(Testimony of Kaname Fujino.)

Q. And that is the original deed which was filed and which you said was filed by you in May, 1941?

A. Yes.

Q. Now in 1941 when you went to the bank to pick up this deed to take it to file, did you give them a receipt for it at that time?

A. I believe so.

Q. Are you pretty certain of that?

A. Yes.

Mr. Jansen: That is all.

Mr. Beebe: No question.

(Witness excused.)

Mr. Jansen: Now, may it please the Court, I have checked the records of the Bishop Bank and they show no record of any deed being left there from March to May, 1941, and then no record of any deed having been left there or any [441] receipt, so far as they have been able to determine or discover. I can produce a witness from the bank to testify to those facts if necessary.

Mr. Beebe: I will check with you—Did you check with Mr. Stanley?

Mr. Jansen: Mr. Stanley, yes.

Mr. Beebe: Did you talk to K. Y. Ching, in the Safe Deposit Department?

(Off-the-record discussion between counsel.)

Mr. Beebe: I will check, if the Court please, and see if they can locate any.

Mr. Jansen: Will you do that as soon as we get through here?

Mr. Beebe: As soon as we get through here I will do it.

The Court: All right.

Mr. Beebe: We wish to call Mrs. Yamamoto as a witness. We have agreed, if your Honor please, with your Honor's consent, that Mr. Adashi may act as interpreter, and Mr. Murakami can check on it.

The Court: Double check it?

Mr. Beebe: Yes.

The Court: All right.

(Mr. Masayuki Adashi was sworn to act as Interpreter from English to Japanese and Japanese to English. Interpreter not sworn.)

The Court (To the Interpreter): Have you ever interpreted in Court before?

Mr. Adashi: No, I have not.

The Court: Let me give you a little bit of instruction. Regardless of what you may think, you are the interpreter and you are going to function just as a sort of a telephone, and you repeat exactly, in translating, word for word, what the attorney says by way of a question, and then repeat the answer given by the witness, word for word, so you are just functioning like a telephone. Don't you put any of your own twists on the questions and answers.

MRS. MAIYO YAMAMOTO

called as a witness for the plaintiff, being first duly sworn through the Interpreter, Mr. Masayuki Adashi, testified as follows (through the Interpreter) :

Direct Examination

By Mr. Beebe:

Q. Please state your name.

A. Maiyo Yamamoto.

Q. How old are you, Mrs. Yamamoto?

A. Sixty-two.

Q. You live here in Honolulu? A. Yes.

Q. And how long have you lived in the Territory of Hawaii? [443]

A. I came here 1907.

Q. And have you resided continuously in the Territory since that time? A. Yes.

Q. Have you ever been married? A. Yes.

Q. Is your husband living or dead?

A. Died.

Q. Do you know, approximately, when your husband died? A. August, 1941.

Q. Now where did he die; here in the Territory, or away from the Territory?

A. He died in Shanghai, China.

Q. And what was your husband's name?

A. Seitaro Yamamoto.

Q. Prior to your husband's death for whom did he work? A. Oahu Junk.

Q. Here in Honolulu? A. Yes.

(Testimony of Mrs. Maiyo Yamamoto.)

Q. And who was the owner, if you know, of the Oahu Junk Company?

A. Fujino, at the beginning.

Q. At the beginning? A. Yes.

Q. Now which Fujino are you referring to?

A. At first, when he begin to work, it was Yotaro Fujino, but after that I don't know.

Q. Now when did your husband start to work, if you recall, for Yotaro Fujino?

A. Up to the time of his death, approximately sixteen years.

Q. And your husband died, as I recall it, in 1941, is that right? A. Yes.

Q. And he worked for the Oahu Junk, as you recall, for sixteen years prior to that time, approximately?

A. Yes, I think so, but I do not know exactly.

Q. Now did you know Yotaro Fujino?

A. Yes.

Q. In 1940 was Yotaro Fujino in the Territory of Hawaii? A. No, he was not.

Q. When did he leave the Territory of Hawaii, if you know? A. I don't remember when.

Q. Well, was it years before 1940—2, 3, 4, 5—or can you tell us, approximately?

A. My husband went back in 1941, and I think five or six years prior to that, but I don't remember.

Q. I see. Now had your husband gone back to Japan at any time prior to 1941? [445]

A. Yes.

Q. When? A. I think 1939, April.

(Testimony of Mrs. Maiyo Yamamoto.)

Q. Now where was Yotaro Fujino at that time; that is, in 1939? A. He was at Tokio.

Q. And had he been away for some years prior to 1939?

A. He was at Tokio—I am not sure, but I think he went back four or five years prior to that.

Q. By “he” you mean Yotaro Fujino?

A. Yes.

Q. Now during the time that Yotaro Fujino was in the Territory can you tell the Court the relationship, the business relationship, between Yotaro Fujino and your husband?

A. He was used to work there, chiefly, doing or writing letters.

Q. Now after Fujino went to Japan did your husband keep on working for Oahu Junk Company? A. Yes.

Q. And do you know Tokuichi Tsuda?

A. Yes, I know.

Q. And Yasuo Tsutsumi? A. Yes, I know.

Q. Do you know where they worked?

A. Yes. [446]

Q. Where? A. Oahu Junk.

Q. For how long a period of time would you say that they worked for the Oahu Junk Company?

A. I don't know because my husband never told me anything about the company.

Q. I see. Now state whether or not your husband used to bring letters and correspondence over from Oahu Junk? A. Yes.

Q. Have you seen the letters?

A. I have not read the letters, but I saw he brought back letters.

(Testimony of Mrs. Maiyo Yamamoto.)

Q. I see. Now after Fujino went to Japan state whether or not Tsuda and Tsutsumi used to come up to your house?

A. Yes, he came quite often, bringing letters from Fujino.

Q. By "he," who do you mean?

A. Tsutsumi. You asked me about Tsutsumi, so I referred to Tsutsumi.

Q. Well, all right, if you so understood. Now, did Tsuda come up to the house?

A. Yes, he used to come.

Q. Would they come together, or sometimes one come and sometimes another?

A. They used to come together, sometimes separately. [447]

Q. Do you know anything about the incorporation of the Oahu Junk Company?

A. I don't know, because my husband never used to discuss that matter with me.

Q. All right. Now state whether or not your husband had various Japanese papers, letters and so forth, in your home at the time of his death?

A. Yes, I had.

Q. Were those letters and so forth in Japanese?

A. Yes.

Q. And where are those papers, documents, letters, books or anything else, now?

A. At the outbreak of the war I was afraid, so I burned everything.

Q. That is right after December the 7th, everything in Japanese you burned up, is that correct?

A. Yes, I was afraid.

(Testimony of Mrs. Maiyo Yamamoto.)

Q. Now where did he keep these books, papers and letters and so forth, in your home?

A. It was situated in a cabinet, in boxes, and I burned that together with the boxes.

Q. Now after your husband's death in 1941 were you paid any money by the Oahu Junk Company?

A. Yes, I did.

Q. How much were you paid? [448]

A. Two thousand dollars.

Q. Anything in addition to that?

A. I don't have anything. I spent that money.

Q. I don't mean that. Were you paid anything in addition to the two thousand dollars? What I am specifically driving at, were you paid a sum of \$300 for funeral expenses, if you know?

A. Yes. The company paid the funeral expenses.

Q. Do you know the amount of that?

A. I don't know. I don't remember.

Mr. Beebe: I think that is all.

The Court: Cross-examination?

Cross-Examination

By Mr. Jansen:

Q. Did the mailman deliver letters from Mr. Fujino to your house?

A. Will you repeat the question, please.

Q. Did the mailman deliver letters from Mr. Fujino, in Japan, to your house? A. Yes.

Q. These letters that Tsuda and Tsutsumi had were letters to the Oahu Junk Company?

A. Yes, it was addressed to Oahu Junk, and my husband used to read that.

(Testimony of Mrs. Maiyo Yamamoto.)

Q. Would Tsuda and Tsutsumi take them back with them [449] when they left?

A. The letters from Japan were mostly left at my home.

Q. Who told you to burn the papers after the war had started?

A. Nobody told me, but I was afraid, so I burned them.

Q. Did you look at the papers before you burned them? A. No, I never examined them.

Q. Were any of the Oahu Junk Company papers in those papers that you burned?

A. Maybe there was, but I did not have a chance to examine. I was so afraid so I burned them.

Q. Why didn't you take the Oahu Junk Company papers back to the company?

A. I could not read. I cannot say there was any, but I was so afraid so I burned them without examining them.

Q. Since you cannot read you don't know whether there were any Oahu Junk papers in that stuff that you burned? A. I cannot tell.

Q. How do you know that letters from Fujino in Japan to your husband came to your house by the mailman?

A. When I opened or got the mail from the mailman there was some letters, so I thought that was for my husband.

Q. Now would your husband take the papers that Tsuda and Tsutsumi brought up from the house, or to the house, back to the Oahu Junk Company later? [450]

(Testimony of Mrs. Maiyo Yamamoto.)

A. Will you repeat that question?

Q. Would your husband take the papers that Tsutsumi and Tsuda brought to the house, back to the Oahu Junk Company, later?

A. I don't know.

Q. Did your husband carry papers back and forth between the house and the Oahu Junk Company?

A. I don't know. I didn't take notice of my husband's departure, and coming in, each time.

Q. Were there any letters that you could tell, in the papers that you burned after the war started?

A. Yes, there was letters I burned together with all the books and the papers.

Q. What did the books look like?

A. Magazines.

Q. No account books were among the papers that were burned by you?

A. I don't know. I burned everything in making Japanese "furo"—that is, hot bath, so I shoved the whole thing in there, and so I don't know.

Q. Before your husband left for Japan did he tell you what to do with his papers?

A. No, he didn't say anything.

Q. Before your husband left for Japan did he take some of these papers down to the Oahu Junk Company? [451]

A. Maybe he did, but I didn't watch him every time, but he is out of the house, so I don't know.

Q. Had you ever seen the papers or looked at them before the time that you burned them?

(Testimony of Mrs. Maiyo Yamamoto.)

A. No, I did not see, because I could not wait. I thought as long as I burned the whole thing—it was safe to burn everything.

Q. Were there many papers like this, among the papers that you burned? (Indicating.)

A. There might be some, but I never took them out of the envelopes, and I do not know. I burned with the envelopes.

Q. Can you try hard and try to remember and give us some idea how many envelopes you may have burned?

A. Approximately, maybe, there was about thirty.

Q. Thirty? A. Yes.

Q. Are you sure now that that is about all; thirty envelopes or letters—envelopes with letters in them?

The Court: She said “maybe 30.”

Mr. Jansen: Maybe 30—

A. I wanted to make sure; as sure as I could. That is approximate. I never counted.

Q. Were the envelopes all in a box or in a big envelope or were they just loose?

A. Some was in a small paper box, and some scattered in [452] the desk drawers, but I bundled them all together and burned them.

Q. Would you think that there were as many as one hundred letters, or would you say it was closer to thirty letters?

A. I don't remember, I did it so hurriedly. I was so afraid, so I didn't count them.

(Testimony of Mrs. Maiyo Yamamoto.)

Q. Were the envelopes with these letters, were there any enveloped that showed they had come from Japan?

A. Well, I guess that was from Japan.

Q. You guess that? A. Yes.

Q. Did your husband ever tell you anything about his business affairs?

Mr. Beebe: Just one second, please. In the last translation, might I ask whether she said it was written in Japanese, and that is the reason I guess it was from Japan?

Interpreter: That is right. That is correct. She said: "It was written in Japanese, so I guess that was from Japan."

Mr. Jansen: That is the impression I got.

Mr. Beebe: May the record be amended to that effect?

Mr. Jansen: Certainly.

The Court: Yes.

Q. Did your husband discuss any of his business affairs with you? [453]

A. No, he never discussed; he never tells business affairs to a woman.

Q. Was he the boss at the Oahu Junk Company?

A. No, he was employed by the Oahu Junk.

Q. Employed by them? A. Yes.

Q. Did he spend much time at the Oahu Junk Company? A. At the time?

Q. Yes.

A. He was in poor health for sometime. He used to come back early, and most of the time he

(Testimony of Mrs. Maiyo Yamamoto.)

used to work at home, but since he died, five years ago, I don't remember so much.

Mr. Jansen: No further questions.

Redirect Examination

By Mr. Beebe:

Q. Do you read any Japanese at all, Mrs. Yamamoto? A. No.

Q. Can you write your name in Japanese?

A. Yes, I can write my name.

Mr. Beebe: I think that is all. Thank you, very much.

The Court: All right, you are excused. Thank you.

(Witness excused.)

Mr. Beebe: There are two things, if your Honor please. Yesterday when I went back to the office, I did not do all the things I promised; to look up our office records, with Mr. Edmondson, [454] and I will check with Mr. Edmondson and check with the bank this morning. And if we could meet up here, say at 1:30 this afternoon, we can close all phases of the case at that time.

The Court: All right. This case may be continued, then, until 1:30 this afternoon, and we will take up the other case.

(Whereupon, an adjournment in this cause was taken until 1:30 o'clock p.m., of this date, November 8, 1946.)

Friday, November 8, 1946,
1:45 o'Clock P.M.

The within-entitled matter came duly on for further hearing, pursuant to the adjournment, at 1:45 o'clock p.m., Friday, November 8, 1946, all parties being present as before, whereupon the following further proceedings were had and done:

The Court: Are you ready?

Mr. Beebe: We are ready to proceed.

Mr. Jansen: Ready, your Honor.

The Court: You may proceed.

Mr. Beebe: During the noon hour, if your Honor please, I did no chore, and, according to our files, on December the 4th, 1940, we received from the Bishop National Bank various documents: a certificate of title, Number 17544; five certificates—I think what Mr. Edmondson intended to say was “search of title,” five searches of title; various deeds—the searches of title being by Wikander—and various deeds; two photostats of power-of-attorney of Chiyono Fujino and Yotaro Fujino, and power-of-attorney of Chiyono Fujino recorded in Book 1270 page 44.

On December 5, 1940, an opinion was written to the Bishop National Bank of Hawaii, Honolulu, Hawaii: “Gentlemen,” and then the head is “Yotaro Fujino mortgage.”

May I read this into the record, if your Honor please?

The Court: Yes. [456]

Mr. Beebe: (Reading.) "This mortgage covers six pieces of property. The first two pieces are subject to existing mortgages to you, and the certificates of title should be brought down to date. Please check payment of this year's taxes on all of the property as the certificates of title on the 3d, 4th and 5th pieces do not show that the second half of 1940 (numerals) taxes has been paid, and the sixth piece is Land Court.

"With regard to the fourth piece of property, it was conveyed to Mr. Fujino by Bishop Trust Company, Limited, trustee, under deed of trust made by Yong Ahin. The certificate does not show that the trustee had power to sell and convey. I think this should be shown.

"The fifth piece of property was acquired from your Mr. Ballentyne, who in turn acquired it after foreclosure of mortgage from Guardian Building & Loan Association. This title was the subject of several suits, but we assume you have previously checked the title and are satisfied that it was clear when Mr. Ballentyne acquired it.

"The sixth piece is subject to the inchoate dower of Maiyo Yamamoto. Under your instructions we have prepared a petition to the Land Court to remove this encumbrance, and we await the signing of the petition and securing of the order of the Land Court clearing title. [457]

"We were instructed to make the note for fifteen thousand dollars (numerals) payable one year after date with interest; after you instructed us verbally to make the note on demand, which we have done.

“The application for the mortgage shows that the mortgage is to be secured for all advances up to twenty-five thousand dollars.

“We call your attention to Chapter 148-A, Session Laws of 1939, at page 211, which provides that a mortgage may secure a deed for present and future advances. Where there is no contractual obligation by the mortgagee to make future advances, they are a prior lien over any mortgages, etc., recorded subsequent to the making of such future advances, but they are not a prior lien if the future advances are made subsequent to the recording of the second mortgage or lien. In other words, if you contracted before hand to make the future advances up to a definite amount they would be protected over all subsequent mortgages and liens, but in the absence of such a contract you should search the record every time to ascertain that no intervening mortgage or lien has attached to the property, if you want your future advances to be a first mortgage. We understand you are satisfied in this present case not to contract to make the future advance, and that if you should make them you will protect yourselves by searching the record. [458]

“Before the mortgage is made you should secure proper power-of-attorney from Mrs. Fujino authorizing the release of her dower. Her existing power-of-attorney does not authorize such release, nor does it authorize borrowing money. We drafted alterations to Mrs. Fujino’s power-of-attorney to cover this. We understand Mrs. Fujino will sign the note.

"If there are any court costs in connection with the petition to the Land Court we shall notify you later.

"Yours very truly, Smith, Wild, Beebe & Cades," and initialed by Mr. Edmonson. I know that is his signature and initials.

Mr. Jansen: So we don't misunderstand, it was on that same day, I think, that the draft of the mortgage appeared.

Mr. Beebe: Yes.

Mr. Jansen: The 5th of December.

Mr. Beebe: Yes.

Mr. Jansen: Exhibit "G"?

Mr. Beebe: Yes.

Mr. Jansen: All right.

Mr. Beebe: There is one thing further, if your Honor please. After leaving here I went down to the Bank of Bishop and saw Mr. Gramberg, and ascertained that they keep duplicate receipt books where a carbon of the original receipt is kept, and they have a receipt book closing December 11, 1940, with [459] the last number in that receipt book being 2000, and the next receipt book then begins at 2201—in other words, there is one receipt book missing. This receipt book beginning with 2201, commencing with one receipt May 5, 1941, and goes right down. That receipt book does not disclose that at any time from May 5, 1941, through June or July, was there any receipt given by Kaname Fujino for any paper that he got from them.

The Court: That covers the receipt. The other question and the other matter concerning which you were asked to investigate was to see if you could supply information on, was as to whether the bank also had any record of ever having received it in the first place.

Mr. Jansen: In that connection, may it please the Court, they have in the bank what they call a safe keeping record, which keeps a chronological record for all documents; documents that are left with the bank for safe-keeping, and I personally examined the safe keeping record and found no entry either with regard to Fujino or the Oahu Junk Company during the period from January the 1st, 1941, until July 1st, 1941; no entry of any document having been left with the bank for safe-keeping during that period.

Mr. Beebe: I am willing that the record should show that, and I understand also that Mr. Jansen is willing that the record will show that on May 19, 1941, Kaname Fujino [460] registered, or was issued a receipt by the Bureau of Conveyances for the receipt of a deed from Yotaro Fujino, by attorney, to Kaname Fujino; that in the Bureau of Conveyances, also on the same day, there has been issued a receipt for a deed from Yotaro Fujino to Kaname Fujino, and Mr. Jansen, I think, being further willing to stipulate that at least so far as this second deed is concerned that it was necessary that a transfer certificate of title be deposited with the deed in the office of the assistant registrar. Is that correct?

Mr. Jansen: Yes. It was my understanding that Kaname Fujino had testified that on May 19, 1941—that is the date that these papers were filed here, he had picked them up at the bank. I am not sure.

Mr. Beebe: I believe that is the case, according to the record.

The Court: Apparently the bank has no record of it. I don't know whether it is important or not. Do either of you attach any significance to the fact that the bank hasn't any record of it?

Mr. Beebe: I do not, but Mr. Jansen might.

Mr. Jansen: I do.

The Court: All right. We will await your argument on the point.

Mr. Beebe: Now Mr. Jansen has suggested, if your Honor please, that this matter be continued until next Friday, and [461] during the interim then we will try to get together on the testimony of Yotaro Fujino, and if we can, o.k.; if we cannot then by that time we may have something else worked out, if that is satisfactory with your Honor.

The Court: Yes. That would be November 15th.

Mr. Beebe: Yes, your Honor.

The Court: At 9 o'clock.

Mr. Jansen: Yes, your Honor.

The Court: One thing I would like to know. It may not be particularly important, but with regard to the shares of stock in the corporation issued to the plaintiff, for which he gave his father a twenty

thousand dollar note, it is not clear to me whether or not the stock was pledged as security for that note.

Mr. Jansen: It was my understanding that that was clearly established, that he had pledged the stock, through his attorneys-in-fact, as security for the note of twenty thousand dollars.

The Court: I would have expected so.

Mr. Beebe: Well, if the record doesn't show that, if your Honor please, we will stipulate that that is the fact.

Mr. Jansen: Yes.

The Court: All right. It may appear in one of the exhibits I have not yet read.

Mr. Beebe: Yes. [462]

The Court: Very well, then, I will continue this case until Friday, November the 15th, at 9 o'clock. We will adjourn at this time.

The Court understands that Hoon Wo Wong has died, and the Court, in respect to his memory, will be closed as of now.

(Adjourned.)

(Whereupon the Court in this cause continued the within-entitled matter until Friday, November 15, 1946, at 9 o'clock a.m.)

Certificate of Temporary Reporter

It Is Hereby Certified that I, R. N. Linn, acting as temporary reporter in this cause on the days of November 6th, 7th and 8th, 1946, after being duly sworn to act as temporary reporter, and that the above and foregoing transcript, pages 111 to 403, inclusive, is a full, true and correct transcript of my shorthand notes taken in the within-entitled matter on the dates therein stated, in the District Court of the United States, in and for the District and Territory of Hawaii, Honolulu, T. H.

/s/ R. N. LINN,

Temporary Reporter.

Honolulu, T. H.,

December 13, 1946.

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS

Honolulu, T. H., November 15, 1946

(The Court convened at 1:35 o'clock p.m.)

The Clerk: Civil No. 704, Kaname Fujino, Plaintiff, versus Tom C. Clark, Attorney General of the United States, acting as Successor to the Alien Property Custodian.

The Court: Are the parties ready for further proceedings?

Mr. Jansen: Yes, your Honor.

Mr. Beebe: If your Honor please, during the interim between the last hearing and this hearing, questions and probable answers were submitted to Mr. Jansen. He advised me that he had wired

Washington for permission to agree that if the questions were propounded to Yotaro Fujino he would answer in the fashion of the answers that we had submitted to him. I understand from Mr. Jansen that he has received word from Washington that he may enter into that arrangement.

Mr. Jansen: The instructions from Washington were that I could use my own discretion in the matter. At least so they told me on the telephone. They said that they had sent a wire to that effect. So I am prepared, your Honor, to have each of the questions and answers inserted into the record, with the understanding, of course, that the admission that we make that the witness, if called and sworn, would so testify, that it does not necessarily imply that we admit that the testimony is binding upon us and that we are free to argue with regard to the testimony and its import from all the evidence in the case. [465]

The Court: Well, let me get this straight. The stipulation is to the effect that if the person were to be called by the Plaintiff——

Mr. Jansen: That's right.

The Court: ——he would so answer——

Mr. Jansen: Yes, your Honor.

The Court: ——so that it wouldn't be binding on you; you would have the right to argue and cross-examine. There is nothing along that line that I can see that you should fear.

Mr. Jansen: I just didn't want to have any misunderstanding in the record.

The Court: All right.

Mr. Jansen: And I suggest that we take each question. Of course, I also want it clearly understood by the preliminary statement that I wasn't waiving any right to object to each particular question on an appropriate ground. And I anticipate that on three or four of the questions I may object and that we may be able to rephrase them, both the questions and answers, in some fashion, when we come to them. But I suggest the best way, if it please the Court, would be to read each question and answer in the record and then, if we have an objection, we will note it at the time.

The Court: I think that is the best way. Proceed.

Mr. Beebe: (Reading from a document.)

"Q. No. 1. Do you own shares of stock in the Oahu Junk Company, Limited, an Hawaiian corporation, having its principal [466] place of business at 1217 North King Street, Honolulu, T. H.? A. Yes."

Mr. Jansen: The answer, we admit, would be "Yes" except that obviously the answer is incorrect because the Custodian has vested the stock and only to the extent that the witness may feel that he has same ownership over and above the actual vesting. We, by allowing the question, don't want to be construed to have admitted that he owns them or has any right in the stock superior to the vesting of the Custodian.

Mr. Beebe: The record may show that. We

understand that those shares of stock were vested in the Custodian.

Mr. Jansen: Yes.

Mr. Beebe: (Reading from a document.)

“Q. No. 2. If so, how many shares?

“A. Two hundred forty.

“Q. No. 3. Does your wife own any shares in the same corporation, and if so, how many shares?

“A. Yes, one hundred nineteen shares.”

Mr. Jansen: And the same is true with regard to the vesting of that stock. We don't want it to be construed as permitting the witness to say that he has any right superior the Custodian.

Mr. Beebe: Yes. (Reading from a document.)

“Q. No. 4. Do you own or have any interest in any land or real property in the Territory of Hawaii? A. No. [467]

“Q. No. 5. If your answer is in the negative to the foregoing, state whether or not you at one time in the past owned any real property in the Territory of Hawaii? A. Yes.

“Q. No. 6. If your answer is in the affirmative to the foregoing, state when you conveyed the real property and to whom conveyance was made?

“A. I conveyed to my son Kaname in 1941.”

Mr. Jansen: Now with regard to that, if it please the Court, we would object to that question and ask

that the answer be stricken upon the grounds that it is incompetent, irrelevant and immaterial, not binding on the Defendant; that the deed, which is in evidence, is the best evidence of any conveyance if any was made.

The Court: Well, that is already in.

Mr. Jansen: Yes, your Honor.

The Court: I don't see what particular harm—

Mr. Jansen: (Interposing.) I want to be certain that there is nothing in the question and answer that by import varies the terms of the written deed, the effect of it, and our objection to the deed and the power of the attorneys-in-fact which is now in evidence. All right.

The Court: Well, with the understanding that that answer would in no way vary the documents that are in evidence.

Mr. Jansen: Yes.

Mr. Beebe (Reading from a document): [468]

“Q. No. 7. If you are not certain as to the date of conveyance, state the year and the month in which conveyance was made.

“A. In February or March, 1941.

Q. No. 8. If your answer to question number six is that you did make a conveyance to Kaname Fujino, your son, state whether or not the conveyance was made for a monetary consideration to you?

“A. Conveyance was made without consideration.”

Mr. Jansen: Of course, the same objection as to the previous question, number six, with regard to the variation of a written contract, I assume it would stand as to all testimony with regard to that.

The Court: Yes.

Mr. Beebe (Reading from a document):

“Q. No. 9. If your answer to the foregoing is that there was no monetary consideration, state whether or not the conveyance was by way of absolute gift?

“A. The conveyance was by way of gift.

“Q. No. 10. State whether or not you have or ever had attorneys-in-fact acting for you in the Territory of Hawaii? A. Yes.

“Q. No. 11. If your answer is in the affirmative, state the names of such attorney or attorneys-in-fact.

“A. Tokuichi Tsuda and Yasuo Tsutsumi.

“Q. No. 12. State whether or not you executed a power of attorney to your attorneys-in-fact the last time in the early part of 1941?

“A. Yes, in February, 1941.

“Q. No. 13. If your answer to the foregoing is in the affirmative, state the date or approximate date, if you can remember?

“A. February 12, 1941.

“Q. No. 14. State whether or not you authorized your attorneys-in-fact to convey all of your real property holdings in the Territory of Hawaii by way of absolute gift to your son Kaname? A. Yes.

“Q. No. 15. If your answer to the foregoing is in the affirmative, tell us how you gave the authorization?

“A. By writing to Oahu Junk Company and to Seitaro Yamamoto.

“Q. No. 16. State when you first considered the question of conveying the real property to your son Kaname Fujino?”

Mr. Beebe: Yes, the record may so show. That is the understanding. The answer as to 16 is:

“A. Prior to my departure from the Territory of Hawaii in February, 1935. [470]

“Q. No. 17. State whether or not you had any discussion concerning the incorporation of your business in the Territory and the transfer by way of gift of your real property holdings in the Territory of Hawaii with Attorney Robert Kiyochi Murakami? A. Yes.

“Q. No. 18. If your answer is in the affirmative, state when and where such discussion took place?

“A. In Japan when Mr. Murakami was visiting during the spring of 1940.

Q. No. 19. State whether or not you discussed the matter of incorporating your business and the giving of your real property to your son with Seitaro Yamamoto when he was in Japan in 1939? A. Yes.

“Q. No. 20. State whether or not you communicated with the Oahu Junk Company and/or with Seitaro Yamamoto to proceed with the incorporation of your business and the transfer of your real property to Kaname Fujino as a gift? A. Yes.

“Q. No. 21. If your answer to the foregoing is in the affirmative, state the approximate date or dates of such communications?

“A. In August, September or October, 1940.

“Q. No. 22. State whether or not you were advised by [471] the Oahu Junk Company, Seitaro Yamamoto, and/or your Attorneys-in-fact concerning the incorporation of your business and/or the transfer of your real property to your son Kaname Fujino by way of gift?

“A. Yes, by the Oahu Junk Company concerning the incorporation in December, 1940, or January, 1941; also from Seitaro Yamamoto in person when he returned to Japan in April, 1941. With reference to the transfer of the real property to Kaname by way of gift, I knew that this was to be done by receipt of a power of attorney by my attorneys-in-fact. I sent them my power of attorney in February, 1941. I was advised of the conveyance in April, 1941, when Seitaro Yamamoto visited Japan.

“Q. No. 23. If your answer is in the affirmative, give us the substance of the record made to you, by whom, and under what circumstances.”

Mr. Jansen: You refer back to the previous answer on that?

Mr. Beebe: Yes. (Reading from a document.)

“Q. No. 24. State whether or not the incorporation, as far as you know, was carried out in accordance with your instruction and wishes? A. Yes.

“Q. No. 25. State whether or not the execution of the deed of conveyance by your attorneys-in-fact as a gift and [472] without monetary consideration to you was in accordance with your instruction or directions and in accordance with your wishes?”

Mr. Jansen: Well that, if it please the Court, that question I think calls for a conclusion and is subject to the objection that it attempts to vary the terms of a written agreement or written power.

The Court: That is the second time that point has come up in these questions and answers. There was one prior question and answer that covered the same ground. I noted it particularly, as you read it.

Mr. Jansen: Well, he has testified regarding his instructions and directions and his wishes.

The Court: The documents?

Mr. Jansen: The documents are still in evidence, and from them it is for the Court to say whether or not there were instructions, there were wishes—whether or not the documents carry out those wishes.

The Court: Well, that's what caused me to think about it twice, and there was some implication there

that there was some other instruction that was given by this man to his attorneys-in-fact that had not heretofore been referred to in the evidence.

Mr. Beebe: Well, if your Honor please, you have that telegram about transferring to Kaname.

The Court: The stock. Well, let us go on and I want to [473] come back to this point when we are through with this matter. But clearly, as I have heretofore ruled, the documents will speak for themselves and these answers will not vary the terms of the written documents.

Mr. Beebe: Oh, there is no question about that.

Mr. Jansen: With that understanding, yes.

Mr. Beebe: This refers to the conveyance by the attorneys-in-fact, and so forth. All right. And the answer to 25:

“A. Yes.

“Q. No. 26. State whether or not you caused the execution of the deed of conveyance to the lands merely as a temporary subterfuge and a cloak and with the idea of having the real property conveyed to you at a later date? A. No.

“Q. No. 27. State whether or not you had any agreement or understanding with your son Kaname that your son would hold the real property conveyed to him for the use and benefit of yourself? A. No.”

Mr. Jansen: With regard to both questions 26 and 27—I withheld the objection because I think they fit together—the first one is: You caused the

execution of the deed of conveyance to the land as a temporary subterfuge and as a cloak and with the idea of having the property reconveyed to you at a later date; and then: Did you have an agreement that he would [474] hold the property conveyed for the use and benefit of yourself—the questions themselves call for a conclusion of the witness. I think it would be appropriate for Counsel to ask the witness whether he had any other agreement or understanding other than that that has been expressed or stated in the previous testimony. But to say I didn't have a cloaking agreement when he doesn't know what a cloaking agreement is, forming a conclusion as to what a cloaking agreement is, I think calls for conclusion. I would have no objection to Counsel putting these two questions in this form: "Did you have any other agreement or understanding regarding this real property with your son?"

The Court: To which you might agree that he would answer——

Mr. Jansen (Interposing): I would agree that he would answer "No," but of course not by his answer.

Mr. Beebe: Let's look at 28 and see if we can meet it by 28. (Reading from a document.)

"Q. No. 28. State whether or not you intended by the deed of conveyance to your son of the real property to make a full, genuine and complete gift to your son for his own use and benefit?"

Mr. Jansen: Well, then, of course we get the question of intent, which is also conclusion, and to determine from the evidence of what actually occurred and from the documents which are here in evidence. All three of them are subject to the same objection. He said, I had this power of attorney; that I had outstanding; and I told my attorneys-in-fact to [475] execute a deed by writing, and so forth and so on, and I did this and I did that, and then it appears in evidence what was done. Now, the intent of the parties is to be gathered from the actual evidence of what has happened and not from a conclusion of the witness as to what was his intent or whether he had a cloaking agreement or a holding agreement. And I'd say if Counsel wants to rephrase those three questions to say, Did you have any other agreement or understanding other than that which you have testified to?

The Court: What is your reaction to that objection, Mr. Beebe?

Mr. Beebe: May I go back just a moment? In the affirmative defenses, if your Honor please, that were set forth in the answer—and I am speaking offhand as to those affirmative defenses—they set up that this conveyance was a subterfuge, as I recall, or language to that effect; it was not a bona fide transfer. And I think, if your Honor please, that we have the right to put at least question number 28 to the witness, that is, "State whether or no you intended by the deed of conveyance to your son of the real property to make a full, genuine and complete gift to your son for his own

use and benefit." The deed is in evidence. There is also the translation of the telegram from these people here to him. Of course, the language of that telegram does not exactly say give—I have forgotten——

Mr. Jansen (Interposing): Well, the telegram was from [476] here to there.

Mr. Beebe: That's right, the telegram was from here to there, and back came the power of attorney.

Mr. Jansen: The letter of power.

Mr. Beebe: Back came the power of attorney. As far as 26 and 27 are concerned——

Mr. Jansen (Interposing): That's 27, 27 and 28.

Mr. Beebe: ——I feel that we are well within our rights and that the questions propounded are proper questions, at least so far as 28 is concerned, if your Honor please.

Mr. Jansen: Well, let me say this—subject to the objection that it cannot vary the terms of the written instruments in evidence in this case for the Court, I have no objection to the witness answering question number 28. How would that do? Would that take care of it?

Mr. Beebe: I think that is all right.

The Court: Very well, with that understanding question 28 may be asked and answered and the other two are deleted.

Mr. Beebe: Withdrawn. The answer to 28:

“A. Yes, I intended to make a complete gift.”

Mr. Jansen: The last of it I think is not responsive. The question can be answered Yes or No, and I think we ought to limit it to Yes.

Mr. Beebe: That is all right.

The Court: So that the answer to 28 is just plain Yes. [477]

Mr. Jansen: That's right.

Mr. Beebe: Yes.

The Court: And 26 and 27, the questions have been withdrawn.

Mr. Jansen: Yes, your Honor. Now maybe I can inject at this stage that, with regard to questions 29 to 39, inclusive, Counsel had proposed no answers, and I suggested that I would be willing—incidentally, they are with regard to what property Yotaro may or may not own in Japan or some place else than the Territory of Hawaii—and I suggested that I would be willing to admit that he would testify that he had sufficient property to keep himself and his wife comfortably.

Mr. Beebe: That's right. All right.

The Court: Very well.

Mr. Beebe: You can just leave this with Mr. Grain and he can copy the questions.

The Court: Well, that's one answer to all of those questions, 29 to 39 inclusive, or the answer to each?

Mr. Beebe: Just a minute.

Mr. Jansen (Referring to a document): Does he have any property outside of Hawaii? What does he have? Does he have any interests in any ship-

ping? What property or business outside of the Territory? What bank deposit, and so on, outside of the Territory?

Mr. Beebe: Well, let's just let it go this way, with reference to his financial condition he would testify as follows. [478]

Mr. Jansen: That's right.

Mr. Beebe: The answer being——

Mr. Jansen: That he owns sufficient property outside of the Territory of Hawaii within his possession and control to provide for himself and his wife comfortably.

Mr. Beebe: Satisfactory.

The Court: Very well.

Mr. Beebe: Well, 40 and 41, 40 is "Have you any correspondence or telegrams which you received from Oahu Junk Company?" I suppose that we can forget those.

Mr. Jansen: I suggest that we must, because I wanted to rest the case. You are satisfied?

Mr. Beebe: Yes, I am satisfied.

The Court: Very well, with that stipulation now recorded and in effect——

Mr. Jansen (Interposing): There is one other point in the form a rebuttal to the testimony of Yotaro Fujino, which is now before the Court——

The Court: Yes?

Mr. Jansen: ——may I have Mr. Kaname Fujino recalled? The Defendant desires to examine him as an adverse witness under the rules, so that there is no question about that.

KANAME FUJINO

a witness in rebuttal, having previously been sworn, testified as follows: [479]

Cross-Examination

By Mr. Jansen:

Q. Kaname, you know that this book that I am showing you is one of the account books of the business, one of the old books? (Showing a book to the witness.) A. Yes.

Q. Have you seen that before? A. I did.

Q. And the writing under date of January 1, 1944, is that in your handwriting?

A. Yes, it is.

The Court: Excuse me. January what?

Mr. Jansen: January 1, 1944.

Q. Now, this that I am showing you purports to be the account of Chiyono Fujino. Chiyono is your mother? A. Yes.

Q. And it say on the page that I am showing you, "Purchase of stock." A. Yes.

Mr. Beebe: I object to that question, if your Honor please, upon the ground that it is improper cross-examination, if this is cross-examination, and as wholly incompetent, irrelevant and immaterial. If he is called on behalf of the Defendant in support of the Defendant's case——

The Court: He is being recalled as a witness, and being [480] the Plaintiff's witness he is presumed to be an adverse witness. So it would be part

(Testimony of Kaname Fujino.)

of further cross-examination. You raise the point, then, that it is not within the scope of the direct examination?

Mr. Beebe: Yes, your Honor.

Mr. Jansen: Well, I might state what I hope to prove by the testimony of this witness. I hope to prove that with regard to the stock of Chiyono, the wife of Yotaro Fujino, in addition to the stock of the two, three children, Yotaro Fujino apparently transferred the stock to his wife with a note or obligation back for the face amount of the stock in the sum of \$11,800, she receiving the 118 shares at that time; and that the same pledge agreement that was in existence with regard to the stock of the children was also inexistence with regard to the stock of Chiyono.

The Witness: That I am not——

The Court: Just a minute. There is no question before you.

Mr. Beebe: I still fail to see the materiality of it so far as Chiyono is concerned, and particularly so far as the Plaintiff is concerned. I think it is clearly, then, improper cross-examination, if your Honor please, not having been touched on, as I recall, in the direct examination.

The Court: I am not too positive, without reviewing my notes, that this witness testified as to the stock set-up [481] Tsuda or Tsutsumi may have. Any of that that has been brought out, that the stock was distributed in a certain way—that being in the picture, it would seem to be in order to cross-

(Testimony of Kaname Fujino.)

examine how much they paid for it or who paid for it. That phase was covered with respect to this witness and the two sisters.

Mr. Beebe: There was in the record, as I recall, evidence to the effect that he got a certain number of shares of stock, that he executed a note for twenty thousand dollars, that the girls each got a certain number of shares. I have forgotten whether it was 118 or something of that kind. And that they executed a note also. But the materiality of this I frankly cannot see, if your Honor please.

The Court: Well, the other two principal stockholders in the corporation, as I get the picture, other than the nominal stockholders who hold a share or two in order to be directors, would be the Plaintiff's father and the Plaintiff's mother.

Mr. Beebe: That is correct.

The Court: So that in relation to the entire picture, I think that an inquiry as to whether the mother paid for her stock or how she paid for it is proper, and preserving your exceptions to the ruling the questions along that line may be put.

Mr. Beebe: All right, exception.

Q. (By Mr. Jansen): This account shows a balance due from your mother [482] of \$11,800. That is the amount of the stock that she received at the time of the incorporation, is it not, the face amount?

A. Yes, I believe, but that is not my handwriting—somebody else.

(Testimony of Kaname Fujino.)

Q. I realize the first part is not your writing.

A. Yes.

Q. But the second part is your writing?

A. At that time the bookkeeper went away, so I just brought it down and that's about all. After that I didn't enter anything.

Q. I see.

The Court: Excuse me. Which is the Plaintiff's writing and which is someone else's?

Q. From here (indicating in a book), 1944 underneath, January 1, 1944, balance \$11,800, is in your writing? A. Yes.

The Court: But the previous entry, December, 1940?

Q. December 1, 1940, the previous entry, is not in your writing? A. No.

The Court: And this in red here (indicating), December 31, 1943, whose writing is that?

The Witness: I put it just to bring it.

The Court: That is your writing, too?

The Witness: Yes.

Q. And what is the purpose of the item over here under [483] credit of \$11,800?

A. Just to bring it forward.

Q. To bring it forward? A. Yes.

Q. Oh, I see. That's a credit against the earlier, December 1, 1940? A. Yes.

Q. So the book, as it stands now, shows a balance of \$11,800? A. Yes.

Q. And that represents?

A. I don't know how this came out.

(Testimony of Kaname Fujino.)

Q. You don't know how it came about but from the face of the record it appears to represent the purchase price of the stock that was issued to your mother, does it not?

A. Yes, that's what it says.

The Court: Let me see if I get this. That is taken to mean that your mother owes \$11,800 to somebody?

Mr. Jansen: These are Yotaro's books, are they?

The Witness: Yes.

Mr. Jansen: These are Yotaro's books.

The Court: And owes that amount of money, then, to your father for the purchase of some stock?

The Witness: Yes.

The Court: Any indication as to what stock that relates to? [484]

Q. That relates to the Oahu Junk Company, does it not? A. Yes.

Mr. Jansen: All right.

The Court: Any questions?

Mr. Beebe: No.

Q. (By Mr. Jansen): Did you know of your own knowledge whether or not any note was given from your mother to your father for that account?

A. No.

Q. Or whether there was any other understanding other than what appears on the books?

A. No.

Q. You don't know anything about that?

A. No.

(Testimony of Kaname Fujino.)

Mr. Jansen: All right. Thank you.

Mr. Beebe: That's all. Thank you.

The Court: All right.

(Witness excused.)

Mr. Beebe: We rest.

The Court: Very well, the case stands submitted. Have we discussed—I'm sure we haven't, it must have been other cases—discussed whether you wish to argue this or file briefs?

Mr. Jansen: We would like to file briefs [485]

Mr. Beebe: Yes.

Mr. Jansen: We asked the Court for time until December 20th to file briefs in another case, and I see no reason why we couldn't work on this brief at the same time and at least get it in by the 25th of December.

The Court: I don't think we will be open for filing that day.

Mr. Jansen: Let's say the 24th.

Mr. Beebe: How do you propose to do it? You file the opening brief?

Mr. Jansen: I don't mind.

Mr. Beebe: That's all right, your Honor. Any time you want is all right with me, providing we are given, say, 20 days after the receipt.

Mr. Jansen: May I suggest until the 24th of December for us, and then 30 days after that for you, and, say, 15 days after that for reply?

Mr. Beebe: O.K.

The Court: All right. The Government is going to file the first brief, which will be filed on or before December 24th.

Mr. Jansen: Yes, sir.

The Court: That means filed here in the Clerk's office.

Mr. Jansen: Yes, sir, with——

The Court: With copies to the other side.

Mr. Jansen: Yes, sir. [486]

The Court: The Plaintiff may then file a brief on or before January 24th, and if the Government wishes to reply to the Plaintiff's brief it may have 15 days subsequent. Receipt or filing?

Mr. Jansen: Well, receipt.

The Court: By you in Washington or by the United States Attorney?

Mr. Jansen: Well, let's make it by the United States Attorney and make it 20 days after receipt by the United States Attorney.

Mr. Beebe: That's satisfactory.

The Court: Twenty days after receipt by the United States Attorney.

Mr. Jansen: That will give five days to give it to us.

The Court: That little point is one we didn't cover in the other arrangement with Mr.——

Mr. Jansen: Mr. Thayer and Mr. Dawson.

The Court: Perhaps you had better, if you want to consider this Washington mail angle, perhaps you had better speak to them as to whether they are in agreement.

Mr. Jansen: All right. Now I might point out that I had authority from Washington to order a transcript of the testimony in this case, as well as the other one, and I have asked the Clerk to proceed with preparing a transcript. That is one of the reasons why I asked for time until the 24th of December [487] when to file a brief. Do you want a copy of the transcript?

Mr. Beebe: Oh, yes. I thought we had agreed on that at the time you spoke to me before.

Mr. Jansen: Oh, yes. I thought we had but I thought we'd better make sure.

The Court: All right. The case, then, stands submitted, and subsequent to receiving your briefs will be decided.

(The Court adjourned at 2:15 o'clock p.m.)

I, Albert Grain, Official Court Reporter, United States District Court, Honolulu, T. H., do hereby certify as follows: That the foregoing is a true and correct transcript of testimony in Civil 704, Kaname Fujino vs. Tom C. Clark; that same was recorded on November 15, 1946, in the above-named court, Hon. J. Frank McLaughlin presiding; and that same was transcribed by me from my stenographic notes of said case.

/s/ ALBERT GRAIN.

December 18, 1946.

From the Minutes of the United States District
Court for the District of Hawaii

Thursday, October 31, 1946

[Title of District Court and Cause.]

On this day came the plaintiff herein with Mr. E. H. Beebe of the firm Smith, Wild, Beebe & Cades, his counsel, and also came Mr. George W. Jansen, chief trial attorney, Department of Justice, counsel for the defendant herein. This case was called for trial.

Motion by Mr. Jansen that the name of Tom C. Clark, Attorney General of the United States as successor to the Alien Property Custodian be substituted as defendant in this cause was granted by the Court.

Mr. Robert H. Murakami, an attorney-at-law, was called and sworn and testified on behalf of the plaintiff.

Copy of Power of Attorney executed by Yotaro Fujino on February 12, 1935, appointing Tokuichi Tsuda and Yasuo Tsutsumi as his attorneys-in-fact was admitted in evidence as Plaintiff's Exhibit "A," marked and ordered filed.

Copy of Power of Attorney executed by Yotaro Fujino on February 12, 1935, appointing Tokuichi Tsuda and Yasuo Tsutsumi as his attorneys-in-fact was admitted in evidence as Plaintiff's Exhibit "B," marked and ordered filed.

Copy of Power of Attorney executed by Chiyono Fujino on February 12, 1935, appointing Tokuichi Tsuda and Yasuo Tsutsumi as her attorneys-in-

fact was admitted in evidence as Plaintiff's Exhibit "C," and marked and ordered filed.

Copy of Articles of Association of Oahu Junk Company, Limited, dated November 27, 1940, was admitted in evidence as Plaintiff's Exhibit "D," marked and ordered filed.

Copy of Power of Attorney executed by Yotaro Fujino, also known as Yootaro Fujino on December 23, 1940, appointing Tokuichi Tsuda and Yasuo Tsutsumi as his attorneys-in-fact was admitted in evidence as Plaintiff's Exhibit "E," marked and ordered filed. [490]

Copy of Power of Attorney executed by Chiyono Fujino on December 23, 1940, appointing Tokuichi Tsuda and Yasuo Tsutsumi as her attorneys-in-fact was admitted in evidence as Plaintiff's Exhibit "F," marked and ordered filed.

Copy of Mortgage dated March 13, 1941 from Yotaro Fujino and Chiyono Fujino to the Bishop National Bank of Hawaii for \$15,000.00 was admitted in evidence as Plaintiff's Exhibit "G," marked and ordered filed.

Copy of Deed from Yotaro Fujino to Kaname Fujino dated March 21, 1941 was admitted in evidence as Plaintiff's Exhibit "H," marked and ordered filed.

Drawing covering Parcels 1, 2, 3, and 4 was admitted in evidence as Defendant's Exhibit No. 1, marked and ordered filed.

Drawing covering Parcel 5 was admitted in evidence as Defendant's Exhibit No. 2, marked and ordered filed.

Drawing covering Parcel 6 was admitted in evidence as Defendant's Exhibit No. 3, marked and ordered filed.

Bill of Sale covering the sale of Yotaro Fujino's interest in the Oahu Junk Company and Oahu Lumber & Hardware Company to the Oahu Junk Company was admitted in evidence as Defendant's Exhibit No. 4, marked and ordered filed.

At 12:00 the Court ordered a recess until 1:30 p.m., this day.

At 1:30 p.m., Mr. Robert Murakami resumed the witness stand.

Copy of Power of Attorney executed by Kaname Fujino on December 12, 1940 appointing Tokuichi Tsuda and Yasuo Tsutsumi as his attorneys-in-fact was admitted in evidence as Plaintiff's Exhibit "I," marked and ordered filed.

Mr. Kaname Fujino, the plaintiff herein, was called and sworn and testified on his own behalf.

Certificate of Expatriation of Kaname Fujino from Japan on January 19, 1939, dated December 2, 1941 was admitted in evidence as Plaintiff's Exhibit "J," marked and ordered filed.

Promissory note of Kaname Fujino dated March 13, 1941 with the Bishop National Bank of Hawaii for \$15,000.00 was admitted in evidence as Plaintiff's Exhibit "K," marked and ordered filed.

Five page letter in Japanese characters, dated January 31, 1941, was admitted in evidence as Plaintiff's Exhibit "L," marked and ordered filed.

At 3:30 p.m., the Court ordered that this case be continued to Monday, November 4, 1946 at 2 p.m. for further trial.

From the Minutes of the United States District
Court for the District of Hawaii

Wednesday, November 6, 1946

[Title of District Court and Cause.]

On this day came the plaintiff herein with Mr. E. H. Beebe of the firm Smith, Wild, Beebe & Cades, his counsel, and also came Mr. George W. Jansen, chief trial attorney, Department of Justice, counsel for the defendant herein. This case was called for further trial.

Mr. Kaname Fujino resumed the witness stand on direct examination.

Translation of the letter marked as plaintiff's Exhibit "L" was admitted in evidence as Plaintiff's Exhibit "L-1," marked and ordered filed.

One page letter in Japanese characters and the translation thereof were admitted in evidence as Plaintiff's Exhibits "M," and "M-1," respectively, marked and ordered filed.

Copy of United States Gift Tax Return for the calendar year 1941 in the name of Yotaro Fujino and cancelled check dated March 16, 1942, payable to the Collector of Internal Revenue in the sum of \$779.63 were admitted in evidence as Plaintiff's Exhibits "N," and "N-1," respectively, marked and ordered filed.

Three page letter in Japanese characters, dated February 19, 1941, and the translation thereof were admitted in evidence as Defendant's Exhibits Nos. 5 and 5-A, respectively, marked and ordered filed.

Bishop National Bank of Hawaii pass book showing account of Riche K. Fujino was admitted in

evidence as Defendant's Exhibit No. 6, marked and ordered filed.

Copy of cablegram dated September 22, 1941, Fujino to Oahu Junk was admitted in evidence as Plaintiff's Exhibit "O," marked and ordered filed.

Mr. Tokuichi Tsuda, manager, Oahu Junk Company, was called and sworn and testified on behalf of the plaintiff.

At 4:08 p.m., the Court ordered that this case be continued to November 7, 1946, at 10 a.m. for further trial.

From the Minutes of the United States District
Court for the District of Hawaii

Thursday, November 7, 1946

[Title of District Court and Cause.]

On this day came the plaintiff herein with Mr. E. H. Beebe of the firm Smith, Wild, Beebe & Cades, his counsel, and also came Mr. George W. Jansen, chief trial attorney, Department of Justice, counsel for the defendant herein. This case was called for further trial.

Mr. Tokuichi Tsuda resumed the witness stand on cross-examination.

Copy of the Minutes of the Board of Directors of Oahu Junk Company under date of June 8, 1942 was admitted in evidence as Plaintiff's Exhibit "P," marked and ordered filed.

Mr. Robert S. Murakami was recalled to the witness stand by the plaintiff and testified further.

Copy of letter in Japanese characters, dated June 30, 1941, Fujino to Oahu Junk Company, and the translation thereof were admitted in evidence as Defendant's Exhibits Nos. 7 and 7-A, respectively, marked and ordered filed.

Radiogram in Japanese words, dated March 23, 1941, Fujino to Oahu Junk Company, and the translation thereof were admitted in evidence as Defendant's Exhibits Nos. 8 and 8-A, respectively, marked and ordered filed.

Copy of radiogram, dated March 21, 1941, Butler to L. C. Bemkumi, was admitted in evidence as Plaintiff's Exhibit "Q," marked and ordered filed.

Copy of radiogram, dated March 24, 1941, Murakami to Reltub, was admitted in evidence as Plaintiff's Exhibit "R," marked and ordered filed.

It was stipulated by respective counsel as to the evidence of Harry Edmondson if he were called as a witness in this case.

Mr. Harry Y. Tsutsumi, Assistant Manager, Oahu Junk Company, was called and sworn and testified on behalf of the plaintiff.

Translation of a portion of a letter in Japanese characters dated March 24, 1941, was admitted in evidence as Defendant's Exhibit No. 9, marked and ordered filed.

Copy of a Deed of Transfer of certain property to Kaname Fujino from Chiyono Fujino dated December 12, 1934 was admitted in evidence as Plaintiff's Exhibit "S," marked and ordered filed.

At 3:07 p.m., the Court ordered that this case be continued to November 8, 1946 at 9 a.m. for further trial.

From the Minutes of the United States District
Court for the District of Hawaii

Friday, November 8, 1946

[Title of District Court and Cause.]

On this day came the plaintiff herein with Mr. E. H. Beebe of the firm Smith, Wild, Beebe & Cades, his counsel, and also came Mr. George W. Jansen, chief trial attorney, Department of Justice, counsel for the defendant herein. This case was called for further trial.

Mr. Tokuichi Tsuda was recalled to the witness stand and testified further.

Mr. Mayo Yamamoto was called and sworn and testified on behalf of the plaintiff.

At 10:12 a.m., the Court ordered that this case be continued to 1:30 p.m., this day for further trial.

At 1:45 p.m., a letter dated December 5, 1940 from Smith, Wild, Beebe & Cades to Bishop National Bank of Hawaii, relative to Yotaro Fujino's mortgage, was read into the record by Mr. Beebe.

At 2:15 p.m., the Court ordered that this case be continued to November 15, 1946 at 9 a.m. for the purpose of agreeing upon the evidence of Yotaro Fujino if he were called as a witness in this case.

From the Minutes of the United States District
Court for the District of Hawaii

Friday, November 15, 1946

[Title of District Court and Cause.]

On this day came Mr. E. H. Beebe of the firm Smith, Wild, Beebe & Cades, counsel for the plaintiff herein, and also came Mr. George F. Jansen, chief trial attorney, Department of Justice, counsel for the defendant herein. This case was called for the purpose of introducing the evidence of Yotaro Fujino by way of stipulation if he were called as a witness.

Certain questions and answer were read into the record by Mr. Beebe.

Mr. Kaname Fujino was recalled and examined by Mr. Jansen in regard to a ledger account of Chiyono Fujino relative to the purchase of stock.

The Court then ordered that briefs be submitted herein and allowed respondent up to December 24, 1946 within which to file opening brief, up to January 24, 1947 for petitioner's brief, and twenty days after the receipt of the reply brief for respondent's closing brief. [498]

[Title of District Court and Cause.]

APPEARANCE

To the Clerk of the United States District Court
for the Territory of Hawaii:

Please enter the appearance of the undersigned
as attorney for Kaname Fujino, plaintiff in the
above cause.

Dated: Honolulu, Hawaii, August 30, 1947.

/s/ GARNER ANTHONY.

[Endorsed]: Filed Aug. 30, 1947.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT
COURT OF APPEALS UNDER RULE 73(b)

Notice is hereby given that Kaname Fujino,
plaintiff above named, hereby appeals to the Circuit
Court of Appeals for the Ninth Circuit from the
final judgment entered in this action on June 5,
1947.

Dated: Honolulu, Hawaii, August 30, 1947.

/s/ GARNER ANTHONY,

Attorney for Kaname Fujino, 312 Castle & Cooke
Building, Honolulu, Hawaii.

[Endorsed]: Filed Aug. 30, 1947.

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Appellant hereby designates the entire record proceedings and evidence together with all exhibits to be contained in the record on appeal except the following exhibits being writings in Japanese characters, viz., Defendant's Exhibit 5, Defendant's Exhibit 7, Defendant's Exhibit 8, Plaintiff's Exhibit L and Plaintiff's Exhibit M, and to include in said record on appeal the notice of appeal filed August 30, 1947, this designation, order enlarging time to docket and file record on appeal, and clerk's certificate to transcript of record on appeal.

Dated: Honolulu, Hawaii, September 30, 1947.

/s/ GARNER ANTHONY,
312 Castle & Cooke Building, Honolulu, Hawaii,
Counsel for Kaname Fujino.

Receipt of a copy acknowledged this 1st day of
October, 1947.

RAY J. O'BRIEN,
U. S. Attorney,

By /s/ MAURICE SAPIENZA,
Assistant U. S. Attorney.

[Endorsed]: Filed Oct. 2, 1947.

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men by These Presents :

That we, Kaname Fujino as principal and Mitsugi Maneki and Tadashi Fujieki of Honolulu, Territory of Hawaii, as sureties, are held and firmly bound unto Tom C. Clark, defendant-appellee, in the penal sum of \$250 for the payment of which, well and truly to be made to the said Tom C. Clark, the said Kaname Fujino as principal and Mitsugi Maneki and Tadashi Fujieki as sureties by these presents do bind themselves, their respective heirs, executors and assigns, jointly and severally, and firmly by these presents. The condition of this obligation is such that whereas the above bounden principal has filed an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment entered in the above entitled cause by the United States District Court for the Territory of Hawaii; [506]

Now, Therefore, if the said principal shall prosecute his appeal with effect and pay all costs if he fails to sustain said appeal then this obligation shall be void, otherwise it shall remain in full force and effect.

In Witness Whereof, the said Kaname Fujino and the said Mitsugi Maneki and Tadashi Fujieki

have hereunto set their hands this 30th day of September, 1947.

/s/ KANAME FUJINO,
Principal.

/s/ MITSUGI MANEKI,
/s/ TADASHI FUJIEKI,
Sureties.

AFFIDAVIT OF SURETIES

Territory of Hawaii,
City and County of Honolulu—ss.

Mitsugi Maneki and Tadashi Fujieki, being first duly sworn, each for himself and not for the other, under oath deposes and says: That they are sureties on the foregoing bond; that they are residents of Honolulu, Territory of Hawaii and have property situated within said territory subject to execution and that they are worth in such property more than double the amount of the penalty specified in said bond over and above all their just debts and liabilities and property exempt from execution.

/s/ MITSUGI MANEKI
/s/ TADASHI FUJIEKI

Subscribed and sworn to before me this 30th day of September, 1947.

[Seal] /s/ CHARLES Y. AWANA,
Notary Public, First Judicial Circuit, Territory
of Hawaii.

My commission expires June 30, 1949.

[Endorsed]: Filed Oct. 2, 1947.

[Title of District Court and Cause.]

ORDER ENLARGING TIME TO DOCKET
RECORD ON APPEAL

It is hereby ordered that the time for filing and docketing the record on appeal in the above cause is hereby extended to November 29, 1947.

Dated: Honolulu, Hawaii, October 2nd, 1947.

/s/ D. E. METZGER,
District Judge.

[Endorsed]: Filed Oct. 2, 1947. [510]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT
COURT, TO TRANSCRIPT OF RECORD
ON APPEAL

United States of America,
District of Hawaii—ss.

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the District of Hawaii, do hereby certify that the foregoing pages numbered from 1 to 510, inclusive, are a true and complete transcript of the record and proceedings had in said court in the above-entitled cause, as the same remains of record and on file in my office, and that the costs of the foregoing transcript of record are \$55.60 and that said amount has been paid to me by the appellant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 5th day of November, 1947.

[Seal] /s/ WM. F. THOMPSON, JR.,
Clerk, United States District
Court, District of Hawaii.

DEFENDANT'S EXHIBIT No. 4

This indenture, made this 2nd day of December, 1940, by and between Yotaro Fujino, heretofore doing business under the trade names of Oahu Junk Company and Oahu Lumber and Hardware Company, hereinafter called the party of the first part, and Oahu Junk Company, Ltd., a Hawaiian corporation, hereinafter called the party of the second part,

Witnesseth That: Whereas, the party of the first part is desirous of transferring to the party of the second part all of his business and assets, except certain items hereinafter mentioned, in exchange for 790 shares of capital stock of the party of the second part of the par value of \$100.00 each; and

Whereas, the party of the second part is desirous of accepting such transfer and assuming the liabilities of the party of the first part in connection with his business aforesaid for the consideration above mentioned;

Now, therefore, this indenture witnesseth: That the party of the first part, in consideration of the premises and the issuance to him of 790 shares of capital stock in the party of the second part, does hereby sell, assign, transfer and set over unto the party of the second part, its successors and assigns, all of his right, title and interest, as of December 1, 1940, in and to that certain business heretofore conducted by the party of the first part at 1217 North King Street, Honolulu, T. H., under the trade names of Oahu Junk Company and Oahu Lumber and Hardware Company, including all cash on hand and in bank, furniture, fixtures, machinery, equipment, automobiles, stock in trade, accounts receivable and the good will of said business; but excepting therefrom loans made by the party of the first part to employees which, as of November 30, 1940, amounted to \$12,513.96.

To have and to hold the same unto the said party of the second part, its successors and assigns, forever; subject, however, to all debts and liabilities of the party of the first part in connection with the operation of said business and which were outstanding as of December 1, 1940.

And for the consideration aforesaid, the party of the second part does hereby accept said transfer of the business and assets from the party of the first part and does hereby covenant and agree with the party of the first part and will all creditors of said party of the first part that it will assume and pay all of said debts and liabilities.

And the party of the second part does hereby agree with the party of the first part that it will forthwith take steps to increase its capital stock and will issue to the party of the first part, or his order, 790 fully paid up shares of its capital stock.

And this indenture further witnesseth: That the party of the first part shall be responsible and liable for all income taxes which may be due and payable for or in connection with the profits of the business made or earned for the current year and up to the date of transfer of said business, and that as between the parties hereto the party of the second part shall not be responsible for profits made or earned prior to the 1st day of December, 1940.

In witness whereof, the parties hereto have executed these presents in duplicate the day and year first above written.

YOTARO FUJINO,

By /s/ TOKUICHI TSUDA,

By /s/ YASUO TSUTSUMI,

His Attorneys-in-Fact.

OAHU JUNK COMPANY, Ltd.

By /s/ TOKUICHI TSUDA,

Its Vice-President

By /s/ YASUO TSUTSUMI,

Its Treasurer.

Territory of Hawaii,
City and County of Honolulu—ss.

On this 5th day of December, 1940, before me personally appeared Tokuichi Tsuda and Yasuo Tsutsumi, to me personally known, who, being by me duly sworn, did say that they are the attorneys-in-fact of Yotaro Fujino duly appointed under power of attorney dated February 12, 1935, and recorded in the Bureau of Conveyances at Honolulu, T. H., in Liber 1357, Pages 73-74; and that the foregoing instrument was executed in the name and behalf of said Yotaro Fujino by said Tokuichi Tsuda and Yasuo Tsutsumi as his attorneys-in-fact; and said Tokuichi Tsuda and Yasuo Tsutsumi acknowledged said instrument to be the free act and deed of said Yotaro Fujino;

And on this 5th day of December, 1940, before me appeared Tokuichi Tsuda and Yasuo Tsutsumi, to me personally known, who, being by me duly sworn, did say that they are the Vice-President and Treasurer, respectively, of Oahu Junk Company, Ltd., a Hawaiian corporation, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that the instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said Tokuichi Tsuda and Yasuo Tsutsumi acknowledged the instrument to be the free act and deed of said corporation.

[Seal] /s/ ERNEST N. NURAKAMI,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

Y. Fujino, Doing Business as Oahu Junk Company and Oahu Lumber and Hardware Company Balance Sheet as at November 30, 1940, and Showing Net Assets Sold on December 1, 1940, in Exchange for 800 Shares, Par Value \$80,000, of Oahu Junk Company, Ltd.

Assets	Assets Sold to Corporation Dec. 1, 1940
Cash on Hand and in Banks.....	\$ 16,213.97
Accounts Receivable	57,422.81
Notes Receivable	2,489.11
Merchandise Inventory	58,907.87
Investments in Bldg. & Loan Companies.....	1,420.00
Bonding Account	300.00
Loans Receivable	16,579.06
Plant and Equipment:	
Autos and Trucks.....	8,548.01
Machinery	5,076.62
Furniture & Fixtures.....	1,589.90
Total Assets	<u>\$168,547.35</u>

Liabilities and Capital		Liabilities Assumed by Corporation Dec. 1, 1940
Accounts Payable		\$ 25,617.47
Temporary Deposit Accounts.....		32,929.88
Notes Payable:		
Bishop National Bank of Hawaii:		
Secured by mortgage on real estate at 1217 N. King St.....	\$ 1,500.00	
Unsecured-Renewable	8,500.00	
Unsecured-Renewable	10,000.00	
	<hr/>	
	\$20,000.00	
Others-Unsecured	10,000.00	30,000.00
	<hr/>	
Total Liabilities		<hr/> \$ 88,547.35
Capital:		
Capital Stock		80,000.00
		<hr/>
Total Liabilities and Capital		<hr/> \$168,547.35 <hr/>

[Endorsed]: Filed C.C.A. Nov. 13, 1947.

DEFENDANT'S EXHIBIT No. 5-A

Yotaro Fujino
No. 19, 3-Chome
Denenchofu
Amori-ku, Japan
Telephone—Denenchofu 2474

February 19, 1941

Messrs. Oahu Junk Company

Gentlemen:

How have you all been since I wrote to you last?
As we are all well please do not worry about us.

Re: Scrap Rubber

Pertaining to pending negotiations for increased February shipment of scrap rubber, I received your cablegram dated February 13 as follows: "We are able to load eight additional American tons of Peeling and one additional American ton of Black Tube, February shipment. May we do so on Kamakura? Reply at once." I immediately asked Mitsui but the request (to accept delivery of additional shipment of scrap rubber) was refused on the ground that February shipments had already been allotted. Furthermore, I was told that March shipments had likewise been allotted. And because of the very low exchange balance I was asked to round up between 30 to 40 tons for April shipment. I thought that under the present strained relation between Japan and the United States it was proper (for the Japanese government) to per-

mit the early shipment of at least a portion of the cargo which had already been assembled. I made repeated requests (to this effect), but without success. I believe that it is a very insincere method of doing things but there is nothing that could be done about it. I presume that you already know about this from our wire of February fifteenth, reading as follows: "Additional shipment of scrap rubber impossible; please ship quantity contracted. At present there is no prospect of loading cement in March."

Re: Cement

With reference to cement, I told you by previous correspondence that Mitsui had informed me that although there was no February allotment there would be some for March and that it would be advisable to ship out a large quantity then. Accordingly, I had informed you by wire. Recently, however, I was surprised to learn that there would be no allotment of cement shipments to foreign countries in March. So I notified you, as first above stated, by my wire dated February fifteenth. Please understand the circumstances. Influenced by the rapidly changing condition of the world at present, the trade condition is very unsettled and we are troubled with the constant disruption of the cement export trade. Needless to say that there is home consumption and the demand (for cement) for the various area, concerning which we cannot write in letters, makes it impossible to predict any

trend. So I feel that it is good policy to have shipped to you as much as possible, even to the extent of overdoing it a little, when it can be shipped out.

The sending of the previous cablegram to you was not my idea alone; I had discussed the matter thoroughly with Mr. Hasegawa of Mitsui Bussan. However, I regret to see such a result. We can't help it, so please understand the circumstances.

YOTARO FUJINO

[Endorsed]: Filed C.C.A. Nov. 13, 1947.

DEFENDANT'S EXHIBIT No. 7-A

No. 19, 3 chome, Denen Cho
bu Omori ku, Tokyo City
Yotaro Fujino

June 30, 1941

Messrs. Oahu Junk Co., Ltd.

I am glad to know that everybody is well. Fortunately we are all well so please feel at ease. I read with thanks the financial report and others up to December 31st of last year, recently sent to me, of my private enterprise which was later incorporated. You may be busy but will you please let me know as in the past years the monthly business condition each month to the necessary extent on the formerly printed form.

Please excuse my haste writing. In closing I pray good health of you all.

[Endorsed]: Filed C.C.A. Nov. 13, 1947.

DEFENDANT'S EXHIBIT 8-A

March 23, 1941.

The last user of the new iron was Sinko Aircraft Kogyosha, 291 Azukizawa, Shimura, Itabashi-ke, usage it for repairing of Factory warehouse.

[Endorsed]: Filed C.C.A. Nov. 13, 1947.

DEFENDANT'S EXHIBIT No. 9

March 24, 1941

Second page of letter dated March 24, 1941,
re: New Iron

Referring to application for export permit of new iron which you had been handling for our interest we received your wire dated March 21 concerning "Inform us name, address, usage of the last user of new iron necessary in application for export permit."

In compliance with your request I inquired Mitsui and was informed, user, Shinko Aircraft Factory, 291 Shozusawa, Shimura, Itabashi Ku, Tokyo City, usage, for repairs of shop and warehouse of the said factory. Therefore we cabled on March 24 "the last user of new iron is Shinko Aircraft Factory, 291 Shozusawa, Shimura, Itabashi ku usage for repairing shop warehouse." We presume you already have been acquainted with the matter from the wire.

[Endorsed]: Filed C.C.A. Nov. 13, 1947.

PLAINTIFF'S EXHIBIT "A"

Know All Men by These Presents:

That I, Yutaro Fujino, doing business as Oahu Junk Company in Honolulu, City and County of Honolulu, Territory of Hawaii, have made, constituted and appointed and by these presents do hereby make, constitute and appoint Tokuichi Tsuda and Yasuo Tsutsumi, both of Honolulu aforesaid, my true and lawful attorneys-in-fact, jointly, for me and in my name, place and stead and for my use and benefit, to ask, demand, sue for, recover, collect and receive all such sums of money, debts, dues, accounts, legacies, bequests, interests, dividends, annuities and demands whatsoever as are now or shall hereafter become due, owing, payable or belonging to me, and have, use and take all lawful ways and means in my name or otherwise for the recovery thereof, by actions at law or in equity, attachments, or otherwise, and to compromise and agree for the same, and grant acquittances or other sufficient discharges for the same, for me, and in my name to make, seal and deliver; to bargain, contract, agree for, purchase, receive and take lands, tenements and hereditaments and accept the seisin and possession of all lands and all deeds and other assurances in the law therefor; to lease, let, demise, bargain, sell, remise, release, convey, mortgage and hypothecate my lands or interests in lands, tenements and hereditaments, upon such terms and conditions, and under such covenants, as they shall

think fit; to vote at all meetings of any company or companies and otherwise to act as my representatives in respect of any shares now held or which may hereafter be acquired by me therein and for that purpose to sign and execute any proxies or other instruments in my name and on my behalf; also to bargain and agree for, buy, sell, mortgage and hypothecate and in any and every way and manner deal in and with goods, wares and merchandise, choses in action, and other property, in possession or in action, and to make, do and transact all and every kind of business of what nature and kind soever; and also for me and in my name and as my act and deed to sign, seal, execute, [Liber 1357, Page 73] deliver and acknowledge such deeds, leases and assignment of leases, covenants, indentures, release of curtesy, agreements, mortgages, hypothecations, bottomries, charter parties, bills of lading, bills, bonds, checks, notes, receipts, evidences of debt, releases and satisfaction of mortgages, judgments and other debts and such other instruments in writing of whatever kind or nature as may be necessary or proper in the premises.

Giving and Granting unto my said attorneys, jointly, full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises,

as fully to all intents and purposes as I might or could do if personally present with full power of substitution and revocation; and hereby Ratifying and Confirming all that my said attorneys, jointly, shall lawfully do or cause to be done by virtue of these presents.

In Witness Whereof, I have hereunto set my hand and seal on this 12th day of February, A. D. 1935, at Honolulu aforesaid.

[Seal] /s/ YOTARO FUJINO

Territory of Hawaii,
City and County of Honolulu—ss.

On this 12th day of February, A. D. 1935, before me personally appeared Yotaro Fujino, to me known to be the person described in and who executed the foregoing instrument and acknowledged that he executed the same as his free act and deed.

[Seal] s/ R. K. MURAKAMI,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

Entered of Record this 5th day of October, A. D. 1936, at 1:07 o'clock p.m. and compared. Mark N. Huckestein, Registrar of Conveyances. By, Clerk.

[Liber 1357, Page 74]

[Endorsed]: Filed C.C.A. Nov. 13, 1947.

PLAINTIFF'S EXHIBIT "B"

Know All Men by These Presents:

That, I, Yootaro Fujino, doing business under the Trade Name of Oahu Junk Company at 1217 North King Street, Honolulu, City and County of Honolulu, Territory of Hawaii, and in every other capacity, have made, constituted and appointed and by these presents do hereby make, constitute and appoint Tokuichi Tsuda and Yasuo Tsutsumi, both of Honolulu aforesaid, my true and lawful attorneys-in-fact, jointly, for me and in my name, place and stead and for my use and benefit, to do all or any of the following acts and things that is to say: to make, do and transact my said business owned and operated by me under the Trade Name of Oahu Junk Company, and also all and every other kind of business of what nature and kind soever, whether in connection with said Oahu Junk Company or otherwise in my own name independently of said Oahu Junk Company; to bargain and agree for, buy, sell, mortgage and hypothecate and in any and every way and manner deal in and with goods, wares and merchandise, choses in action, and other property, in possession or in action; to transact my business with the Bishop National Bank of Hawaii at Honolulu, Bishop and King Streets, Honolulu, City and County of Honolulu, Territory of Hawaii; to draw checks on said bank; to endorse checks, promissory notes, drafts and bills of exchange for collection or deposit; and to waive

demand, notice and notice of protest of all such writings; to borrow from time to time such sums of money and upon such terms as my said attorneys shall deem proper and expedient, upon the security of any or all of my property, whether real or personal, or otherwise without security, and for such purposes to give, make, execute, sign, seal, acknowledge and deliver, as collateral thereto, mortgages on such property, with the usual power of sale and foreclosure, and such other provisions and covenants [Liber 1270, Page 42] therein as they deem proper, and to give, make, sign and deliver any and all promissory notes and other negotiable instruments or such other writings necessary or proper or convenient in the premises; and to give, execute, make, sign and deliver such guaranty, indemnity or other agreement or undertaking or such other instruments as may be necessary or proper in connection with the carrying on of my said business.

Giving and Granting unto my said attorneys, jointly, full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might or could do if personally present with full power of substitution and revocation; and hereby Ratifying and Confirming and I hereby covenant to ratify and confirm all that my said attorneys or any substitutes shall lawfully do or cause to be done by virtue of these presents.

In Witness Whereof, I have hereunto set my hand and seal on this 12th day of February, A. D. 1935, at Honolulu aforesaid.

[Seal] /s/ YOOTARO FUJINO

Territory of Hawaii,
City and County of Honolulu—ss.

On this 12th day of February, A. D. 1935, before me personally appeared Yootaro Fujino to me known to be the person described in and who executed the foregoing instrument and acknowledged that he executed the same as his free act and deed.

[Seal] /s/ MALTBIE L. HOLT,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

Entered of Record this 1st day of March A. D. 1935 at 10:35 o'clock a.m. and compared. Mark N. Huckestein, Registrar of Conveyances. By....., Clerk.

[Liber 1270, Page 43]

[Endorsed]: Filed C.C.A. Nov. 13, 1947.

PLAINTIFF'S EXHIBIT "C"

Know All Men by These Presents:

That I, Chiyono Fujino, doing business under the Trade Name of Oahu Junk Company at 1217 North King Street, Honolulu, City and County of Honolulu, Territory of Hawaii, and in every other capacity, have made, constituted and appointed and by these presents do hereby make, constitute and appoint Tokuichi Tsuda and Yasuo Tsutsumi, both of Honolulu aforesaid, my true and lawful attorneys-in-fact, jointly, for me and in my name, place and stead and for my use and benefit, to do all or any of the following acts and things that is to say: to make, do and transact my said business owned and operated by me under the Trade Name of Oahu Junk Company, and also all and every other kind of business of what nature and kind soever, whether in connection with said Oahu Junk Company or otherwise in my own name independently of said Oahu Junk Company; to bargain and agree for, buy, sell, mortgage and hypothecate and in any and every way and manner deal in and with goods, wares and merchandise, choses in action, and other property, in possession or in action; to transact my business with the Bishop National Bank of Hawaii at Honolulu, Bishop and King Streets, Honolulu, City and County of Honolulu, Territory of Hawaii; to draw checks on said bank; to endorse checks, promissory notes, drafts and bills of exchange for collection or deposit; and to waive, demand, notice and notice of protest of all such writings; to borrow from time to time such sums of money and upon such terms as my

said attorneys shall deem proper and expedient, upon the security of any or all of my property, whether real or personal, or otherwise without security, and for such purposes to give, make, execute, sign, seal, acknowledge and deliver, as collateral thereto, mortgages on such property, with the usual power of sale and foreclosure, and such other [Liber 1270, Page 44] provisions and covenants therein as they deem proper, and to give, make, sign and deliver any and all promissory notes and other negotiable instruments or such other writings necessary or proper or convenient in the premises; and to give, execute, make, sign and deliver such guaranty, indemnity or other agreement or undertaking or such other instruments as may be necessary or proper in connection with the carrying on of my said business.

Giving and Granting unto my said attorneys, jointly, full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might or could do if personally present with full power of substitution and revocation; and hereby Ratifying and Confirming and I hereby covenant to ratify and confirm all that my said attorneys or any substitutes shall lawfully do or cause to be done by virtue of these presents.

In Witness Whereof, I have hereunto set my hand and seal on this 12th day of February, A. D. 1935, at Honolulu aforesaid.

[Seal] /s/ CHIYONO FUJINO
(Japanese characters)

Territory of Hawaii,
City and County of Honolulu—ss.

On this 12th day of February, A. D. 1935, before me personally appeared Chiyono Fujino to me known to be the person described in and who executed the foregoing instrument and acknowledged that she executed the same as her free act and deed.

[Seal] /s/ MALTBIE L. HOLT,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

Entered of Record this 1st day of March A. D. 1935 at 10:36 o'clock a.m. and compared. Mark N. Huckestein, Registrar of Conveyances. By _____, Clerk.

[Liber 1270, Page 45]

[Endorsed]: Filed C.C.A. Nov. 13, 1947.

PLAINTIFF'S EXHIBIT "D"

In the Office of the Treasurer of the
Territory of Hawaii

In the Matter of the Incorporation of Oahu Junk
Company, Ltd.

ARTICLES OF ASSOCIATION

Know All Men by These Presents:

That we, Yotaro Fujino, of Toyko, Japan, Chi-yono Fujino, also of Tokyo, Japan, and Katsue Fujieki, Shizue Maneki, Tokunichi Tsuda, Yasuo Tsutsumi and S. Yamamoto, all of Honolulu, City and County of Honolulu, Territory of Hawaii, desiring to be incorporated as a joint stock company of limited liability in accordance with the laws of the Territory of Hawaii and to obtain the benefits conferred by said laws to and upon corporations, have entered into the following Articles of Association, the terms whereof it is agreed shall be equally binding upon the parties signing this instrument and upon all others who from time to time hereafter may become members of this joint stock company and who may hold stock therein.

I.

The name of the corporation shall be "Oahu Junk Company, Ltd."

II.

The principal office and place of business of this corporation shall be at 1217 North King Street,

Plaintiff's Exhibit "D"—(Continued)

Honolulu, City and County of Honolulu, Territory of Hawaii, or at such other location as may be hereafter decided upon by the Board of Directors.

The corporation shall have power to conduct its business in any part of the United States and in foreign countries; and the corporation may establish branch offices and agencies in any part of the Territory of Hawaii and elsewhere as may be deemed necessary or convenient by the Board of Directors.

III.

The purposes and objects for which this corporation is organized are as follows:

(a) To purchase, acquire, take over, conduct and carry on the business now carried on by Yotaro Fujino under the trade name of Oahu Junk Company and also under the trade name of Oahu Lumber and Hardware Company, and to pay for same in cash, stock of this corporation, or otherwise, and to assume the liabilities of said Yotaro Fujino in connection with said business;

(b) To deal in junk and second-hand goods as well as new merchandise, and also to deal in lumber, building materials, paint and hardware;

(c) To buy, sell, import, export, exchange, manufacture, trade and deal in goods, wares, merchandise, commodity, material and products, of every kind, nature or description;

(d) To act as agent, factor or broker for any individual, firm, partnership or corporation;

Plaintiff's Exhibit "D"—(Continued)

(e) To acquire, buy, sell, take on lease, lease, let, exchange, assign, mortgage, hypothecate and otherwise deal in any property, real, personal or mixed, as may be necessary or convenient in the conducting or maintaining of the business of this corporation or in the exercise of its corporate powers;

(f) To acquire, hold, buy and sell shares of capital stock in other corporations and to exercise all rights, privileges and powers incident to such ownership of stock;

(g) And without limit as to the amount to borrow money, to draw, make, accept, endorse, discount, execute and issue promissory notes, drafts, bills of exchange, warrants, bonds, debentures, and other negotiable or transferable instruments and evidences of indebtedness, whether secured by mortgage or otherwise, as well as to secure the same by mortgage, by pledge or by hypothecation of any of its property, or otherwise, so far as may be permitted by the laws of the Territory of Hawaii;

(h) To apply for, obtain, register, lease or otherwise or in any manner acquire, and to hold, use, operate, sell, assign or otherwise dispose of any trade names, trade marks, copyrights, patents, inventions, improvements and processes used in connection with the business of the corporation or secured under letters patent or copyright privileges of the Territory of Hawaii, or of the United States or any other country;

Plaintiff's Exhibit "D"—(Continued)

(i) To acquire, take over and conduct the business, property and liabilities of any person, firm, partnership or corporation carrying on any business which this corporation is authorized to carry on, or possessed or property suitable for any of the purposes of the corporation, and pay for the same in cash or in the stocks, bonds, debentures or other securities of this corporation or otherwise; and in case of any such other corporation to effect such purpose by acquiring, holding and voting a majority of the shares of the capital stock thereof;

(j) To maintain and operate warehouses for the storage of goods, wares and merchandise;

(k) To purchase, hold, cancel and re-issue the shares of its capital stock;

(l) To establish and support, or aid in the establishment and support of associations, institutions and conveniences calculated to benefit any of the employees or ex-employees of the corporation, or the dependents or relatives of such persons, and to grant pensions and allowances, and to make payments towards old-age or other insurance, and to subscribe or guarantee money for charitable or benevolent objects, or for any exhibition, or for any public, general or useful object;

(m) To do any or all of the things permitted by the laws of the Territory of Hawaii to the same extent as natural persons might or could do in any part of the world as principal, agent, contractor, trustee or otherwise and either alone or in company with others; and

Plaintiff's Exhibit "D"—(Continued)

(n) To engage in or conduct any other or different business or trade and to do any and all other acts and things necessary, convenient or proper in the exercise of its corporate powers which an individual, firm or copartnership lawfully could do and which corporations are not prohibited by law from doing.

IV.

That the capital stock of the corporation shall be One Thousand Dollars (\$1,000.00) divided into ten (10) shares of the par value of One Hundred Dollars (\$100.00) each, with the option or privilege of increasing and extending the said capital stock from time to time to a sum not exceeding Five Hundred Thousand Dollars (\$500,000.00) and to issue new shares of stock to represent the same. Stock of the corporation shall have such voting powers, restrictions and/or privileges as may be prescribed by the By-Laws.

V.

The officers of the corporation shall be a president, one or more vice-presidents, a secretary, a treasurer and an auditor. The by-laws may provide for the number of vice-presidents, for such other officers or assistants or subordinate officers as may be deemed advisable. The corporation may employ any person or firm who is not a stockholder to audit the corporate books and accounts.

The board of directors of the corporation shall consist of not less than five (5) directors. The exact

Plaintiff's Exhibit "D"—(Continued)

number of directors may be fixed by the by-laws and that until so fixed the number of directors shall be seven (7). The board of directors shall, subject to the limitations contained in the by-laws of the corporation, have and exercise all powers and authority of the corporation and shall have the general management and control of all business, property and affairs of the corporation.

All officers and directors of the corporation shall be elected or appointed as the by-laws shall direct, provided that the officers and directors of the corporation, until their successors are chosen, shall be:

Yotaro Fujino, President and Director.

Tokuichi Tsuda, Vice-President and Director.

Yasuo Tsutsumi, Treasurer and Director.

Shizue Maneki, Secretary and Director.

Kastue Fujieki, Auditor and Director.

Chiyono Fujino, Director.

S. Yamamoto, Director.

VI.

The corporation hereby organized shall be a body corporate under the laws of the Territory of Hawaii, with all the rights, powers and immunities which are now or may hereafter be secured by law to incorporate companies, and shall be subject to all general laws now in force or hereafter to be enacted relating to corporations of like character; it shall

Plaintiff's Exhibit "D"—(Continued)

have succession by its corporate name for the term of fifty (50) years from the date hereof, and shall have power:

(a) To sue and be sued in its corporate name in any Court;

(b) To make and use a common seal and alter the same at its pleasure;

(c) To make and amend by-laws not inconsistent with these Articles of Association or any existing laws for the management of its property and business, the selection and removal of its officers and directors, and the regulation of its affairs, disposal of its property and the transfer of its stock;

(d) To appoint such subordinate officers, boards, committees and agents as the business of the corporation may require, and to remove them at its pleasure; and

(e) To do and perform any and all such other acts, matters and things, not contrary to law, as its business may require.

VII.

No stockholder shall be liable for the debts of the corporation beyond such amount as shall be due and unpaid on the share or shares held by him.

VIII.

This corporation shall have the right to issue certificates of shares of its capital stock on receipt of

Plaintiff's Exhibit "D"—(Continued)

the par value of the same. Dividends, whether cash or otherwise, on such shares may be declared by the Board of Directors in such amounts, at such times and in such form, as the profits of the business and condition of the corporation may justify in the judgment of the Board of Directors.

IX.

Service of legal process upon any of the officers of the corporation, except the Auditor, shall be binding upon the corporation.

In witness whereof, the said parties hereto have hereunto set their hands and seals this 27th day of November, 1940.

YOTARO FUJINO,

By /s/ TOKUICHI TSUDA,

By /s/ YASUO TSUTSUMI,

His Attorneys-in-Fact.

CHIYONO FUJINO,

By /s/ TOKUICHI TSUDA,

By /s/ YASUO TSUTSUMI,

Her Attorneys-in-Fact.

/s/ KATSUE FUJIEKI,

/s/ SHIZUE MANEKI,

/s/ TOKUICHI TSUDA,

/s/ YASUO TSUTSUMI,

/s/ S. YAMAMOTO.

Plaintiff's Exhibit "D"—(Continued)

Territory of Hawaii,
City and County of Honolulu—ss.

On this 27th day of November, 1940, before me personally appeared Tokuichi Tsuda and Yasuo Tsutsumi, to me personally known, who, being by me duly sworn, did say that they are the attorneys-in-fact of Yotaro Fujino duly appointed under power of attorney dated February 12, 1935, recorded in the Bureau of Conveyances at Honolulu, T. H., in Liber 1357, Pages 73-74, and that the foregoing instrument was executed in the name and behalf of said Yotaro Fujino by said Tokuichi Tsuda and Yasuo Tsutsumi as his attorneys-in-fact; and said Tokuichi Tsuda and Yasuo Tsutsumi acknowledged said instrument to be the free act and deed of said Yotaro Fujino;

And on this 27th day of November, 1940, before me personally appeared Tokuichi Tsuda and Yasuo Tsutsumi, to me personally known, who, being by me duly sworn, did say that they are the attorneys-in-fact of Chiyono Fujino duly appointed under power of attorney dated February 12, 1935, recorded in the Bureau of Conveyances at Honolulu, T.H., in Liber 1270, Pages 44-45, and that the foregoing instrument was executed in the name and behalf of said Chiyono Fujino by said Tokuichi Tsuda and Yasuo Tsutsumi as her attorneys-in-fact; and said Tokuichi Tsuda and Yasuo Tsutsumi acknowledged said instrument to be the free act and deed of said Chiyono Fujino;

Plaintiff's Exhibit "D"—(Continued)

And on this 27th day of November, 1940, before me personally appeared Fatsue Fujieki, Shizue Maneki, Tokuichi Tsuda, Yasuo Tsutsumi and S. Yamamoto, to me known to be the persons described in and who executed the foregoing instrument and acknowledged that they executed the same as their free act and deed.

[Seal] ERNEST N. MURAKAMI,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

In the Office of the Treasurer
of the Territory of Hawaii

In the Matter of the Incorporation of Oahu Junk
Company, Ltd.

AFFIDAVIT OF INCORPORATION

Territory of Hawaii,
City and County of Honolulu—ss.

Tokuichi Tsuda, Vice-President, Shizue Maneki, Secretary, and Yasuo Tsutsumi, Treasurer, of the corporation asking to be incorporated under the laws of the Territory of Hawaii under the name of Oahu Junk Company, Ltd., being severally sworn, do hereby depose and say:

1. That the capital stock of the corporation is One Thousand Dollars (\$1,000.00) divided into ten (10) shares of the par value of One Hundred Dol-

Plaintiff's Exhibit "D"—(Continued)

lars (\$100.00) each, with the privilege of increasing said capital stock to the sum of Five Hundred Thousand Dollars (\$500,000.00).

2. That all of the capital stock has been subscribed and paid for in cash as follows:

Names of Subscribers	No. of Shares	Par Value of Shares
Yotaro Fujino	2	\$ 200.00
Chiyono Fujino	1	100.00
Katsue Fujieki	2	200.00
Shizue Maneki	2	200.00
Tokuichi Tsuda	1	100.00
Yasuo Tsutsumi	1	100.00
S. Yamamoto	1	100.00
Total	10	\$1,000.00

3. That there has been paid into the treasury of the corporation on said capital stock subscribed for as aforesaid the sum of One Thousand Dollars (\$1,000.00).

/s/ TOKUICHI TSUDA,
Vice-President.

/s/ SHIZUE MANEKI,
Secretary.

/s/ YASUO TSUTSUMI,
Treasurer.

Subscribed and sworn to before me this 27th day of November, 1940.

[Seal] ERNEST N. MURAKAMI,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

[Endorsed]: Filed C.C.A. Nov. 13, 1947.

PLAINTIFF'S EXHIBIT "E"

Office of the Assistant Registrar, Land Court, Territory of Hawaii (Bureau of Conveyances)

Honolulu, Hawaii, Mar 17 1941

The attached instrument is a true copy of Document Number 57281, received for registration in this office, Mar. 17, 1941, at 2:33 o'clock p.m. and noted on Certificate of Title Number 3.

Attest:

[Seal] /s/ OLIVER R. AIU,

Assistant Registrar, Land Court, Territory of Hawaii.

POWER OF ATTORNEY

Know All Men by These Presents:

That I, Yotaro Fujino, also known as Yootaro Fujino, formerly residing in Honolulu, City and County of Honolulu, Territory of Hawaii, but now residing in Tokyo, Japan, do hereby make, constitute and appoint Tokuichi Tsuda and Yasuo Tsutsumi, whose residence and post office address is 1217 North King Street, Honolulu, aforesaid, jointly, my true and lawful attorneys in fact for me and in my name, place and stead and for my use and benefit, to do all or any of the following acts and things, that is to say: To carry on and transact all my business in the Territory of Hawaii; to enter into, perform and carry out, and to rescind, terminate and cancel contracts of all kinds; to buy, take on lease and otherwise ac-

quire, and to hold, sell, mortgage, hypothecate, pledge, lease and otherwise dispose of, and in any and every way and manner deal with real property, leaseholds and other interests in real property, stocks, bonds, goods, wares, merchandise, choses in action and other property and rights of any nature whatsoever in possession or in action; to sign, seal, execute, acknowledge and deliver deeds, bills of sale, contracts, agreements, options, leases and other instruments; to transact my business with Bishop National Bank of Hawaii at Honolulu; to draw checks for the withdrawal of funds from said bank; to endorse checks, promissory notes, drafts, and bills of exchange for collection or deposit; to accept drafts and other negotiable instruments and to receive, endorse and negotiate and deliver bills of lading and other evidences and documents of title to merchandise, stock certificates and other securities; to waive demand, notice and notice of protest of checks, bills, notes and other negotiable instruments; to borrow money from time to time upon such terms and at such rates of interest as my said attorneys shall deem proper and expedient either without security or upon the security of all or any portion or portions of my property whether real, personal or mixed, and to give, make, sign, seal, execute, acknowledge and deliver promissory notes and other obligations, mortgages, pledge agreements, hypothecations and other securities and any such mortgage, pledge agreement or hypothecation may be with such powers of sale and/or foreclosure and

may contain such other provisions, covenants and conditions as my said attorneys may agree to, and to execute all documents and writings of whatsoever kind and nature in connection therewith; to collect, receive, enforce payment and collection of and otherwise reduce to possession, and receipt and give releases and discharges for all sums of money and other kinds of property whatsoever that may be due, payable or belonging to me, or to which I may be entitled to possession of; to remise, release and quitclaim to all my estate, right, title and interest including any curtesy in any property of whatsoever kind and nature; to give, make, sign, seal, execute and deliver such bonds, guaranty, indemnity or other agreements or undertakings as may be necessary or proper or convenient in connection with any of the transactions hereby authorized; and to vote at any and all meetings of stockholders any shares of stock which I may own on any and all questions that may come before such meetings.

And I hereby revoke those two certain powers of attorney heretofore made by me to my said attorneys, both dated February 12, 1935, one signed Yootaro Fujino and recorded in the Bureau of Conveyances at Honolulu in Honolulu aforesaid, in Book 1270, Page 42, and the other signed Yotaro Fujino, recorded in said Bureau in Book 1357, Page 73.

Giving and Granting unto my said attorneys jointly full power and authority to do and perform all and every act and thing whatsoever requisite

and necessary to be done in and about the premises as fully to all intents and purposes as I might or could do if personally present, and to do any of said acts and things either for me alone and/or jointly with another or others, and with full power of substitution and revocation; and I hereby ratify and confirm, and covenant to ratify and confirm all that my said attorneys or any substitute or substitutes shall lawfully do or cause to be done by virtue of these presents.

In witness whereof, I have hereunto set my hand and seal this 20th day of February, 1941.

(Signed)

[Seal]

YOTARO FUJINO.

Certificate of Acknowledgment
of Execution of Document

Empire of Japan, Prefecture of Tokyo, City of
Tokyo, Consulate General of the United States
of America

I, Charles H. Stephan, Vice Consul of the United States of America at Tokyo, Japan, duly commissioned and qualified, do hereby certify that on this 20th day of February, 1941, before me personally appeared Yotaro Fujino, sometimes known as Yootaro Fujino, to me personally known, and known to me to be the individual described in, whose name is subscribed to, and who executed the annexed instrument, and being informed by me of the contents of said instrument, he duly acknowledged to me that he executed the same freely and

voluntarily for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and official seal the day and year last above written.

/s/ CHARLES H. STEPHAN,
Vice Consul of the United
States of America.

Service No. 732

American Consulate General Fee Stamp \$2.00

[Endorsed]: Filed C.C.A. Nov. 13, 1947.

PLAINTIFF'S EXHIBIT "F"

Office of the Assistant Registrar, Land Court, Territory of Hawaii (Bureau of Conveyances)

Honolulu, Hawaii, Mar 17 1941

The attached instrument is a true copy of Document Number 57282, received for registration in this office Mar. 17, 1941, at 2:34 o'clock, p.m., and noted on Certificate of Title Number 3.

Attest:

[Seal] /s/ OLIVER R. AIU,
Assistant Registrar, Land Court, Territory of
Hawaii.

Know All Men by These Presents:

That I, Chiyono Fujino, wife of Yotaro Fujino, alias Yootaro Fujino, of Tokyo, Japan, have made, constituted and appointed and by these presents do hereby make, constitute and appoint Tokuichi Tsuda

and Yasuo Tsutsumi, both of Honolulu, City and County of Honolulu, Territory of Hawaii, my true and lawful attorneys-in-act, jointly, for me and in my name, place and stead and or my use and benefit in the Territory of Hawaii, to ask, demand, sue for, recover, collect and receive all such sums of money, debts, dues, accounts, legacies, bequests, interests, dividends, annuities and demands whatsoever as are now or shall hereafter become due, owing, payable or belonging to me, and have, use and take all lawful ways and means in my name or otherwise for the recovery thereof, by actions at law or in equity, attachments, or otherwise, and to compromise and agree for the same, and acquittances or other sufficient discharges for the same, for me, and in my name to make, seal and deliver; to bargain, contract, agree for, purchase, receive and take lands, tenements and hereditaments and accept the seisin and possession of all lands and all deeds and other assurances in the law therefor; to lease, let, demise, bargain, sell, remise, release, convey, mortgage and hypothecate my lands or interests in lands, tenements and hereditaments, upon such terms and conditions, and under such covenants, as they shall think fit; to release my dower in all lands, interests in land, tenements and hereditaments either by joining in any deed or mortgage to be made by my said husband or by separate instrument as my said attorneys shall decide; to borrow money either for me alone or jointly with my said husband and to promise and agree to repay the same with interest and upon such terms and at such times and places as my said attorneys shall decide; to vote at all

meetings of any company or companies and otherwise to act as my representatives in respect of any shares now held or which may hereafter be acquired by me therein and for that purpose to sign and execute any proxies or other instruments in my name and on my behalf; to represent me in any and all matters coming before the Bureau of Internal Revenue, Washington, D. C., or any representative thereof, regarding the filing of annual income tax returns or delinquent or amended income tax returns or other returns or reports of whatever nature, including claims for refund or credit, the payment of any and all taxes which may be due and payable and the receiving, indorsing and cashing of all checks received from the Treasury Department, Washington, D. C., or elsewhere, which may apply to the refunding of taxes or otherwise; to make and file such returns or reports as may be required by the Social Security Board and the Bureau of Internal Revenue, Washington, D. C., or which may be required by the Tax Commissioner of the Territory of Hawaii, or any other governmental authority; also to bargain and agree for, buy, sell, mortgage and hypothecate and in any and every way and manner deal in and with goods, wares and merchandise, choses in action, and other property, in possession or in action, and to make, do and transact all and every kind of business of what nature and kind soever; and also for me and in my name and as my act and deed to sign, seal, execute, deliver and acknowledge such deeds, leases and assignment of leases, covenants, indentures, agreements, mortgages, hypothecations, bottomries,

charter parties, bills of lading, bills, bonds, checks, notes, receipts, evidences of debt, releases and satisfaction of mortgages, judgments and other debts and such other instruments in writing of whatever kind or nature as may be necessary or proper in the premises.

Giving and Granting unto my said attorneys, jointly, full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might or could do if personally present, with full power of substitution and revocation, and hereby ratifying and confirming all that my said attorneys, jointly, shall lawfully do or cause to be done by virtue of these presents.

I hereby declare that this power of attorney shall supersede that certain power of attorney executed by me on the 12th day of February, 1935, recorded in the Office of the Registrar of Conveyances at Honolulu, T.H., in Liber 1270, Pages 44-45, and that by the recording of this power of attorney, said power of attorney dated February 12, 1935, shall become null and void.

In witness whereof, I have hereunto set my hand and seal this 23rd day of December, 1940.

HER SEAL

(Chiyono Fujino in Japanese Characters)

Witness:

/s/ M. O. KASAWA

/s/ K. FUJINO

Certificate of Acknowledgment
of Execution of Document

Empire of Japan, Prefecture of Tokyo, City of
Tokyo, Consulate of the United States of
America.—ss.

I, David Thomasson, Vice Consul of the United
States of America at Tokyo, Japan, duly commis-
sioned and qualified, do hereby certify that on this
23rd day of December, 1940, before me personally
appeared Chiyono Fujino, to me personally known,
and known to me to be the individual described in,
whose name is subscribed to, and who executed the
annexed instrument, and being informed by me of
the contents of said instrument, she duly acknowl-
edged to me that she executed the same freely and
voluntarily for the uses and purposes therein men-
tioned.

In witness whereof, I have hereunto set my hand
and official seal the day and year last above written.

/s/ DAVID THOMASSON,

Vice Consul of the United
States of America.

Service No. 5205

American Consulate General Fee Stamp \$2.00

[Endorsed]: Filed C.C.A. Nov. 3, 1947.

PLAINTIFF'S EXHIBIT "G"

Office of the Assistant Registrar, Land Court, Territory of Hawaii (Bureau of Conveyances)

Honolulu, Hawaii, Mar. 17, 1941.

The attached instrument is a true copy of Document Number 57283, received for registration in this office, Mar. 17, 1941, at 2:35 o'clock p.m., and noted on Certificate of Title Number 17544.

And also recorded in the Bureau of Conveyances in Liber 1626, Pages 166-172.

Attest:—

[Seal] /s/ OLIVER P. AIU,

Assistant Registrar, Land
Court, Territory of Hawaii.

This Indenture, made this 13th day of ~~December, 1940,~~ March, 1941, between Yootaro Fujino (also known as Yotaro Fujino), whose wife's name is Chiyono Fujino, of Honolulu, City and County of Honolulu, Territory of Hawaii, hereinafter called the "Mortgagor," and Bishop National Bank of Hawaii at Honolulu, a national banking association, whose principal place of business is corner of King and Bishop Streets, Honolulu aforesaid, and whose post office address in said Honolulu is P. O. Box 3200, hereinafter called the "Mortgagee,"

Witnesseth That:

The Mortgagor, in consideration of the sum of Fifteen Thousand and No/100ths Dollars (\$15,000.00) now paid to him by the Mortgagee, the receipt of which the Mortgagor hereby acknowl-

Plaintiff's Exhibit G—(Continued)

edges, and also in consideration of any and all other sums of money now owing by and/or that may hereafter be advanced or paid to or on account of or become owing by the Mortgagor to the Mortgagee, does hereby grant, bargain, sell and convey unto the Mortgagee and its successors and assigns:

First: All that certain parcel of land (portion of the land described in Royal Patent 688, Land Commission Award 1239, Apana 2, to Pine) situate at Kapalama, Honolulu aforesaid, and thus bounded and described:

Beginning at the South corner of King Street and a land leading to the Former Japanese Hospital, and running as follows:

1. S. 33° 10' E. true 112 feet along King Street;
2. S. 63° W. true 150 feet along remaining portion of Apana 2, R. P. 688 to Pine;
3. N. 23° 35' W. true 102 feet along Japanese Hospital;
4. Thence to the initial point, along land 132.5 feet.

Containing an area of 15,000 square feet, or thereabouts, and being the land conveyed to the Mortgagor by Lam Shee, by deed dated August 3, 1926, and recorded in the Bureau of Conveyances at Honolulu in Book 842, Page 4.

Second: All that certain parcel of land (portion of the land described in Land Commission Award 2222, Apana 3, to Kapalu) situate at Kapalama, Honolulu aforesaid, and thus bounded and described:

Beginning at a 1" galvanized iron pipe, at the North corner of this lot and the west corner of

Plaintiff's Exhibit G—(Continued)

Lot No. 3, the coordinates of said point of beginning referred to Government Survey Trig. Station "Punchbowl" being 5142.6 feet north and 7247.2 feet west, and running by true azimuths and distances:

1. $334^{\circ} 10'$ 114.8 feet along Lot 3 to a 1" galvanized iron pipe;
2. $62^{\circ} 19'$ 107.9 feet along Lot 1 to a 1" galvanized iron pipe;
3. $146^{\circ} 45'$ 115.2 feet along fence, along B. P. Bishop Estate to a 1" galvanized iron pipe;
4. $242^{\circ} 19'$ 122.8 feet along fence along L.C.A. 1917, Apana 1, to Hiki, to Nieper, to the point of beginning.

Containing an area of 13,234 square feet, or thereabouts, and being the land conveyed to the Mortgagor by Sano Danjo, by deed dated March 1, 1923, and recorded in said Bureau in Book 671, page 319.

Third: All that certain parcel of land (portion of the land described in Royal Patent 2082, Land Commission Award 2222, Apana 3 to Kapalu) situate at Kapalama, Honolulu aforesaid, and thus bounded and described:

Beginning at a 1 in. galv. iron pipe, at the North corner of this lot and the East corner of Lot No. 3, the coordinates of aid point of beginning referred to City and County Survey Trig. Station "Punchbowl" being 5045.3' North and 7214.7' West and running by true azimuths and distances:

1. $334^{\circ} 20'$ 115.4 feet along fence, along L.C.A. #1239 to Pine, to J. H. Schnack, to a post;
2. $61^{\circ} 24'$ 102.4 feet along L.C.A. #4455 Ap. 1 to Kaaloa, to a $1\frac{1}{4}$ " galvanized iron pipe in concrete;

Plaintiff's Exhibit G—(Continued)

3. 146° 45' 117.7 feet along fence, along B. P. Bishop Estate to a 1-in. galvanized iron pipe;
4. 242° 19' 117.9 feet along Lots #2 and #3 to the point of beginning.

Containing an area of 12,810 square feet, or thereabouts, and being the land conveyed to the Mortgagor by Jirokichi Fujiyoshi, by deed dated October 5, 1933, and recorded in said Bureau in Book 1219, page 193.

Fourth: All that certain parcel of land (portion of the land described in Royal Patent 1506, Land Commission Award 2319, Apana 2 to Nawai) adjoining the Kalihi Branch of the Oahu Railway & Land Co.'s 40 foot Right of Way, Southeasterly from Waiakamilo Road at Kapalama, Honolulu aforesaid, and thus bounded and described:

Beginning at a pipe at the South corner of this piece of land, on the Northeast side of the Oahu Railway and Land Company's 40 foot Right of Way (Kalihi Branch) the coordinates of said point of beginning referred to Government Survey Triangulation Station "Mokauea" being 5541.20 feet South and 1710.02 feet West and running by true azimuths:

1. 146° 07' 60.22 feet along Oahu Railway and Land Company's 40-foot Right of Way (Kalihi Branch) to a pipe in concrete;
2. 155° 40' 63.85 feet along Section "Z" of Land Court Application 750 to a pipe in concrete;
3. 243° 02' 136.70 feet to a pipe in concrete;
4. 325° 00' 168.00 feet along Section "Y" of Land Court Application 750 to a pipe in concrete;
5. 78° 23' 161.62 feet to the point of beginning.

Plaintiff's Exhibit G—(Continued)

Containing an area of 21,224 square feet, or thereabouts, and being the land conveyed to the Mortgagor by Bishop Trust Company, Limited, Trustee, by deed dated January 28, 1933, and recorded in said Bureau in Book 1192, page 464.

Fifth: All that certain parcel of land (portion of the land described in L. C. A. 7714-B, Apana 7 to Moses Kekuaiwa; R. P. 2145 L. C. A. 2319, Part 2, Apana 2 to Nawai) situate at Kapalama, Honolulu aforesaid, and bounded and more particularly described as follows:

Beginning at a point on the Easterly boundary of this piece of land and the Westerly side of the Oahu Railway and Land Company's 40-foot Right of Way, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Punchbowl" being 4,739.4 feet North, 7,605.9 feet West, and the true azimuth and distance to a $1\frac{1}{4}$ inch pipe set in concrete monument on the East line of L. C. A. 8515, Apana 1 to Keoni Ana, being $326^{\circ} 07' 429.00$ feet, and running by true azimuths:

1. $81^{\circ} 25'$ 20.30 feet along portion of Kapalama owned by the Andrews Estate;
2. $357^{\circ} 10'$ 72.00 feet along same;
3. $333^{\circ} 10'$ 98.50 feet along same;
4. $69^{\circ} 15'$ 69.50 feet along L.C.A. 8515, Apana 1 to Keoni Ana to a pipe in concrete;
5. $151^{\circ} 00'$ 96.00 feet along Kapalama to a pipe in concrete;
6. $66^{\circ} 15'$ 134.00 feet along same to a pipe in concrete;
7. $161^{\circ} 10'$ 62.50 feet along L.C.A. 1730, Apana 2, Kilauea;
8. $228^{\circ} 00'$ 50.00 feet along same;
9. $136^{\circ} 05'$ 55.00 feet along same;

Plaintiff's Exhibit G—(Continued)

10. 79° 20' 36.00 feet along same;
11. 152° 30' 50.00 feet along L.C.A. 1731, Apana 1, to Kaaua;
12. 241° 30' 52.00 feet along same;
13. 166° 00' 147.00 feet along same;
14. 245° 00' 130.00 feet along L.C.A. 1730, Apana 1, to Kilauea;
15. 326° 07' 283.00 feet along the Westerly side of the Oahu Railway and Land Company's 40-foot Right of Way to the point of beginning and containing an area of 1.63 acres, or thereabouts.

Being the land conveyed to the Mortgagor by Watson Ballentyne, by deed dated October 28, 1936, and recorded in said Bureau in Book 1348, page 261.

Sixth: All that certain parcel of land situate at Kapalama, City and County of Honolulu, said Territory, described as follows:

Lot Twenty-five-C (25-C), area 3,028.0 square feet, of Section C, as shown on Map 3, filed in the Office of the Assistant Registrar of the Land Court of the Territory of Hawaii with Land Court Application No. 750 of the Trustees under the Will and of the Estate of Bernice P. Bishop, deceased, and being all of the land comprised in Transfer Certificate of Title No. 17,544 issued to the Mortgagor.

And the reversions, remainders, rents, issues and profits thereof, and all of the estate, right, title and interest of the Mortgagor both at law and in equity, therein and thereto;

To Have and to Hold the same, together with the buildings, improvements, tenements, rights, easements, privileges and appurtenances to the same

Plaintiff's Exhibit G—(Continued)

belonging or appertaining or held and enjoyed therewith, unto the Mortgagee, its successors and assigns forever;

Provided, However, that if the Mortgagor shall pay to the Mortgagee said sum of \$15,000.00, with interest thereon at the rate of six per cent per annum, according to the tenor of that certain promissory note in that amount bearing even date herewith and secured hereby and payable to the order of the Mortgagee in the manner in said promissory note set forth the terms of which said note are incorporated herein by reference and according to the tenor of any renewals thereof, net over and above all taxes levied and assessed upon or in respect of the debt and interest, and shall discharge any and all obligations that now are or hereafter may be or become owing directly or contingently by the Mortgagor to the Mortgagee on any and every account whether or not the same are mature, of which obligations the books of the Mortgagee shall be prima facie evidence and which obligations it is agreed by these presents are and shall be secured as an additional charge against all the property hereby mortgaged, shall observe and perform all the covenants and agreements herein contained and pay the costs of release, Then These Present Shall Be Void.

But Upon Failure to pay said principal or interest when due, or upon the breach of any covenant or agreement hereof in any promissory note or terms of any other obligation hereby secured, then and in either of such events the whole amount of all

Plaintiff's Exhibit G—(Continued)

indebtedness owing by or chargeable to the Mortgagor under any provision of this mortgage or intended to be secured hereby, on any and every account, shall at the option of the Mortgagee, and without notice, at once become due and payable, and with or without foreclosure, the Mortgagee shall have the immediate right to receive and collect all rents, income and profits from the property hereby mortgaged due or accrued or to become due and said rents and profits are hereby assigned to the Mortgagee and said Mortgagee is hereby irrevocably appointed the attorney in fact of the Mortgagor in the name of the Mortgagor or in its own name to demand, sue for, collect, recover and receive all such rents and profits, to compromise and settle claims for rents or profits upon such terms and conditions as to it may seem proper, to enter into, renew or terminate leases or tenancies, and the Mortgagee may foreclose this mortgage by suit in equity with the immediate right to a receivership upon ex parte order and without bond pending foreclosure, or as now provided by law by entry and possession, or (with or without entry and possession) may sell the said property or any part thereof either as a whole or in parcels, together with all improvements that may be upon the property so sold, at public auction, and may in its own name or as the attorney in fact of the Mortgagor, for such purpose hereby irrevocably appointed, effectually convey the property so sold to the purchaser or purchasers absolutely and

Plaintiff's Exhibit G—(Continued)

forever; and any foreclosure shall forever bar the Mortgagor and all persons claiming under the Mortgagor from all right and interest in said property at law and in equity; and out of the proceeds of any foreclosure sale the Mortgagee may deduct all costs and expenses of sale, foreclosure and/or suit including an attorney's fee; may pay and discharge any prior lien on said property and/or advances made by the Mortgagee for the benefit or protection thereof or connected with this mortgage and retain or be awarded all sums then payable by or chargeable to the Mortgagor on every account, rendering to the Mortgagor the surplus, if any. If such proceeds shall be insufficient to discharge the same in full, the Mortgagee may have any other legal recourse against the Mortgagor for the deficiency. The Mortgagee may be the purchaser at any foreclosure sale.

The Mortgagee shall have the right to enforce one or more remedies hereunder or any other remedy it may have, successively or concurrently.

The Mortgagee shall have the right and is hereby expressly authorized to make application of any payments made to it and of any rents, income and profits collected by it upon the obligations and liabilities of the Mortgagor to the Mortgagee, other than the promissory note hereinabove referred to.

And the Mortgagor hereby covenants with the Mortgagee, as follows:

That the Mortgagor will pay and discharge the obligations secured hereby and all taxes, rates,

Plaintiff's Exhibit G—(Continued)

assessments, rents, impositions, duties and charges of every kind and nature, which are now or may hereafter be levied or assessed or become or threaten to become a charge upon or against or relate to said mortgaged property or the debt and interest, the payment of which is secured by these presents; and that in default of any such payment or upon failure to observe or perform any covenant or condition of this mortgage, the Mortgagee may make any advances and incur attorney's fees that to it may seem proper or necessary to protect said property and/or this mortgage and the rights of the Mortgagee hereunder and recover any such advances made and all expenses, including attorney's fees, paid or incurred by it, even though any such charge be invalid, upon demand, together with interest thereon to the date of payment at the rate of six per cent per annum, and the same shall be secured hereby;

That the Mortgagor will keep the mortgaged property in good condition and repair, and comply with all laws and governmental rules and regulations applicable thereto, and not commit or suffer any strip or waste, and that the Mortgagee may enter and inspect the premises and make any repairs which it deems proper and the cost thereof shall constitute an advance under the preceding paragraph hereof;

And will keep the improvements on said premises insured against fire in an amount equal to the full insurable value thereof and in such manner and

Plaintiff's Exhibit G—(Continued)

form and in such insurance companies as the Mortgagee shall designate, and deposit the policy or policies therefor with the Mortgagee, it being agreed that the proceeds of insurance shall be applied by the Mortgagee, at its option, either to rebuilding or repair of damage, or in reduction of any indebtedness hereunder, and any other insurance procured thereon shall be made payable as directed by and be claimable by the Mortgagee;

That in case the mortgaged property or any part thereof is condemned the Mortgagee may appear and defend any such suit and is hereby irrevocably authorized to collect all the proceeds, and apply the same upon any obligation secured hereby and all costs, expenses and attorneys' fees paid or incurred by it shall constitute an advance hereunder;

That the Mortgagor will keep the mortgaged property free of all liens that may be, or be threatened to be, made, prior to the lien of this mortgage;

That the Mortgagor is the owner in fee simple of the above described property; that said property is free from all encumbrances that the Mortgagor has good right to grant and convey the same unto the Mortgagee as aforesaid, and will Warrant and Defend the same unto the Mortgagee, forever, against the claims and demands of all persons;

And for the consideration aforesaid, Chiyono Fujino, wife of the Mortgagor, does hereby release and quitclaim unto the Mortgagee, its successors and assigns, forever, all her right, title and interest by

Plaintiff's Exhibit G—(Continued)

way of dower or otherwise in and to the said land and every part thereof.

That the term “Mortgagee” as and when used herein shall include the Mortgagee, its successors and assigns and that the term “Mortgagor” as and when used herein shall include the Mortgagor and the Mortgagor's heirs, executors, administrators, successors and assigns; that all covenants and agreements on the part of the Mortgagor to be observed and performed shall be joint and several if entered into by more than one; that the singular shall include the plural and vice versa; and the use of any gender shall include all genders;

That these presents are and shall be a continuing security mortgage for all present obligations of the Mortgagor to the Mortgagee and for all future advances which may be made from time to time by the Mortgagee to the Mortgagor and for all future obligations direct or indirect of the Mortgagor to the Mortgagee, and that payment of any present and/or future debt and/or obligation of the Mortgagor as aforesaid shall not release these presents, which shall continue as security as aforesaid until a release hereof is filed in the Office of said Assistant Registrar of the Land Court and recorded in the Bureau of Conveyances at Honolulu aforesaid.

Plaintiff's Exhibit G—(Continued)

In Witness Whereof, the Mortgagor and his said wife have hereunto set their hands and seals the day and year first above written.

YOTARO FUJINO,
CHIYONO FUJINO,

[Seal] By TOKUICHI TSUDA,
Their Attorney in Fact.

YOTARO FUJINO,
CHIYONO FUJINO,

[Seal] By YASUO TSUTSUMI,
Their Attorney in Fact.

I hereby certify that the month and year "December, 1940" appearing in the first line, page 1, of this instrument, were changed to read "March, 1941" prior to execution and acknowledgment hereof.

/s/ K. Y. CHING,
Notary Public.

Territory of Hawaii,
City and County of Honolulu—ss.

On this 13th day of March, 1941, before me personally appeared Tokuichi Tsuda and Yasuo Tsutsumi, to me known to be the persons who executed the foregoing instrument in behalf of Yootaro Fujino (also known as Yotaro Fujino) and Chiyono Fujino, husband and wife, and acknowledged that they executed the same as their free act and deed of Yootaro Fujino and Chiyono Fujino.

[Seal] /s/ K. Y. CHING,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

[Endorsed]: Filed C.C.A. Nov. 13, 1947.

PLAINTIFF'S EXHIBIT H

Office of the Assistant Registrar, Land Court,
Territory of Hawaii (Bureau of Conveyances)

Honolulu, Hawaii, May 19, 1941.

The attached instrument is a true copy of Document Number 58404, received for registration in this office, May 19, 1941, at 11:47 o'clock a.m., and noted on Certificate of Title Number 3, and from which Certificate of Title Number 24074 has been issued.

And also recorded in the Bureau of Conveyances in Liber 1638, Pages 423-427.

Attest:—

[Seal] /s/ OLIVER P. AIU,

Assistant Registrar, Land
Court, Territory of Hawaii.

Know All Men by These Presents:—

That Yotaro Fujino (also known as Yootaro Fujino), whose wife's name is Chiyono Fujino, of Honolulu, City and County of Honolulu, Territory of Hawaii, Grantor, for and in consideration of the sum of One Dollar (\$1.00) to him in hand paid by his son, Kaname Fujino, an unmarried man, whose residence and post office address is 1217 North King Street, Honolulu aforesaid, Grantee, the receipt whereof is hereby acknowledged, and in further consideration of the love and affection which the Grantor has for the Grantee, does hereby

Plaintiff's Exhibit H—(Continued)

given, grant, bargain, sell and convey unto said Grantee, his heirs and assigns:

First: All that certain parcel of land (portion of the land described in Royal Patent 688, Land Commission Award 1239, Apana 2, to Pine) situate at Kapalama, Honolulu aforesaid, and thus bounded and described:

Beginning at the South corner of King Street and a lane leading to the Former Japanese Hospital, and running as follows:

1. S. $33^{\circ} 10'$ E. tree 112 feet along King Street;
2. S. 63° W. true 150 feet along remaining portion of Apana 2, R. P. 688 to Pine;
3. N. $23^{\circ} 35'$ W. true 102 feet along Japanese Hospital;
4. Thence to the initial point, along lane 132.5 feet.

Containing an area of 15,000 square feet, or thereabouts, and being the land conveyed to the Grantor by Lam Shee, by deed dated August 3, 1926, and recorded in the Bureau of Conveyances at Honolulu in Book 842, Page 4.

Second: All that certain parcel of land (portion of the land described in Land Commission Award 2222, Apana 3, to Kapalu) situate at Kapalama, Honolulu aforesaid, and thus bounded and described;

Beginning at a 1" galvanized iron pipe, at the North corner of this lot and the west corner of Lot No. 3, the coordinates of said point of beginning referred to Government Survey Trig. Station "Punchbowl" being 5142.6 feet North and 7247.2

Plaintiff's Exhibit H—(Continued)

feet West, and running by true azimuths and distances:

1. 334° 10' 114.8 feet along Lot 3 to a 1" galvanized iron pipe;
2. 62° 19' 107.9 feet along Lot 1 to a 1" galvanized iron pipe;
3. 146° 45' 115.2 feet along fence, along B. P. Bishop Estate to a 1-in. galvanized iron pipe;
4. 242° 19' 122.8 feet along fence along L.C.A. 1917, Apana 1, to Hiki, to Nieper, to the point of beginning.

Containing an area of 13,234 square feet, or thereabouts, and being the land conveyed to the Grantor by Sano Danjo, by deed dated March 1, 1923, and recorded in said Bureau in Book 671, Page 319.

Third: All that certain parcel of land (portion of the land described in Royal Patent 2082, Land Commission Award 2222, Apana 3 to Kapalu) situate at Kapalama, Honolulu aforesaid, and thus bounded and described:

Beginning at a 1 in. galv. iron pipe, at the North corner of this lot and the East corner of Lot No. 3, the coordinates of said point of beginning referred to City and County Survey Trig. Station "Punch-bowl" being 5045.3' North and 7214.7' West and running by true azimuths and distances:

1. 334° 20' 115.4 feet along fence, along L.C.A. #1239 to Pine, to J. H. Schnack, to a post;
2. 61° 24' 102.4 feet along L.C.A. #4455 Ap. 1 to Kaaloa, to a 1¼ in. galvanized iron pipe in concrete;
3. 146° 45' 117.7 feet along fence, along B. P. Bishop Estate to a 1-in. galvanized iron pipe;
4. 242° 19' 117.9 feet along Lots #2 and #3 to the point of beginning.

Plaintiff's Exhibit H—(Continued)

Containing an area of 12,810 square feet, or thereabouts, and being the land conveyed to the Grantor by Jirokichi Fujiyoshi, by deed dated October 5, 1933, and recorded in said Bureau in Book 1219, Page 193.

Fourth: All that certain parcel of land (portion of the land described in Royal Patent 1506, Land Commission Award 2319, Apana 2 to Nawai) adjoining the Kalihi Branch of the Oahu Railway & Land Co.'s 40 foot Right of Way, Southeasterly from Waiakamilo Road at Kapalama, Honolulu aforesaid, and thus bounded and described:

Beginning at a pipe at the South corner of this piece of land, on the Northeast side of the Oahu Railway and Land Company's 40 foot Right of Way (Kalihi Branch) the coordinates of said point of beginning referred to Government Survey Triangulation Station "Mokaeu" being 5541.20 feet South and 1710.02 feet West and running by true azimuths:

1. $146^{\circ} 07'$ 60.22 feet along Oahu Railway and Land Company's 40-foot Right of Way (Kalihi Branch) to a pipe in concrete;
2. $155^{\circ} 40'$ 63.85 feet along Section "Z" of Land Court Application 750 to a pipe in concrete;
3. $243^{\circ} 02'$ 136.70 feet to a pipe in concrete;
4. $325^{\circ} 00'$ 168.00 feet along Section "Y" of Land Court Application 750 to a pipe in concrete;
5. $78^{\circ} 23'$ 161.62 feet to the point of beginning.

Plaintiff's Exhibit H—(Continued)

Containing an area of 21,224 square feet, or thereabouts, and being the land conveyed to the Grantor by Bishop Trust Company, Limited, Trustee, by deed dated January 28, 1933, and recorded in said Bureau in Book 1192, Page 464.

Fifth: All that certain parcel of land (portion of the land described in L. C. A. 7714-B, Apana 7 to Moses Kekuaiwa; R. P. 2145, L. C. A. 2319, Part 2, Apana 2 to Nawai) situate at Kapalama, Honolulu aforesaid, and bounded and more particularly described as follows:

Beginning at a point on the Easterly boundary of this piece of land and the Westerly side of the Oahu Railway and Land Company's 40-foot Right of Way, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Punchbowl" being 4,739.4 feet North, 7,605.9 feet West, and the true azimuth and distance to a 1 $\frac{1}{4}$ inch pipe set in concrete monument on the East line of L. C. A. 8515, Apana 1 to Keoni Ana, being 326° 07' 429.00 feet, and running by true azimuths:

1. 81° 25' 20.30 feet along portion of Kapalama owned by the Andrews Estate;
2. 357° 10' 72.00 feet along same;
3. 333° 10' 98.50 feet along same;
4. 69° 15' 69.50 feet along L.C.A. 8515, Apana 1 to Keoni Ana to a pipe in concrete;
5. 151° 00' 96.00 feet along Kapalama to a pipe in concrete;
6. 66° 15' 134.00 feet along same to a pipe in concrete;
7. 161° 10' 62.50 feet along L.C.A. 1730, Apana 2, Kilauea;
8. 228° 00' 50.00 feet along same;
9. 136° 05' 55.00 feet along same;
10. 79° 20' 36.00 feet along same;

Plaintiff's Exhibit H—(Continued)

11. 152° 30' 50.00 feet along L.C.A. 1731, Apana 1, to Kaaua;
12. 241° 30' 52.00 feet along same;
13. 166° 00' 147.00 feet along same;
14. 245° 00' 130.00 feet along L.C.A. 1730, Apana 1, to Kilauea;
15. 326° 07' 283.00 feet along the Westerly side of the Oahu Railway and Land Company's 40-foot Right of Way to the point of beginning and containing an area of 1.63 acres, or thereabouts.

Being the land conveyed to the Grantor by Watson Ballentyne, by deed dated October 28, 1936, and recorded in said Bureau in Book 1348, Page 261.

Sixth: All that certain parcel of land situate at Kapalama, City and County of Honolulu, said Territory, described as follows:

Lot Twenty-five-C (25-C), area 3,028.0 square feet, of Section C, as shown on Map 3, filed in the Office of the Assistant Registrar of the Land Court of the Territory of Hawaii with Land Court Application No. 750 of the Trustees under the Will and of the Estate of Bernice P. Bishop, deceased, and being all of the land described in Transfer Certificate of Title No. 17,544 issued to said Grantor.

To Have and to Hold the same, together with all buildings, improvements, rights, easements, privileges and appurtenances thereunto belonging or appertaining or held and enjoyed therewith, unto said Grantee, his heirs and assigns, forever; Subject, However, to that certain Mortgage made by the Grantor to Bishop National Bank of Hawaii at Honolulu, dated March 13, 1941, filed in the Office of the Assistant Registrar of the Land Court of the Territory of Hawaii as Document No. 57283

Plaintiff's Exhibit H—(Continued)

and noted on said Transfer Certificate of Title No. 17,544, and also recorded in the Bureau of Conveyances at Honolulu in Book 1626, Page 166.

And said Grantor does hereby covenant with said Grantee, that he is lawfully seised in fee simple of the granted property and has good right to grant and convey the same as aforesaid; that said property is free and clear of all encumbrances, except as aforesaid; and that he will and his heirs, executors and administrators shall warrant and defend the same unto said Grantee, his heirs and assigns, forever, against the lawful claims and demands of all persons.

And for the consideration aforesaid, Chiyono Fujino, wife of said Grantor, does hereby release, remise and quitclaim unto said Grantee, his heirs and assigns, forever, all of her right, title and interest, by way of dower or otherwise, in and to the said granted property.

In Witness Whereof, said Grantor and his wife have hereunto set their hands and seals this 21st day of March, A.D. 1941.

YOTARO FUJINO

(Also Known as Yootaro
Fujino),

By /s/ TOKUICHI TSUDA,

By /s/ YASUO TSUTSUMI,

His Attorneys-in-Fact.

CHIYONO FUJINO,

By /s/ TOKUICHI TSUDA,

By /s/ YASUO TSUTSUMI,

Her Attorneys-in-Fact.

Plaintiff's Exhibit H—(Continued)

Territory of Hawaii,

City and County of Honolulu—ss.

On the 21st day of March, 1941, before me personally appeared Tokuichi Tsuda and Yasuo Tsutsumi, to me personally known, who, being by me duly sworn, did say that they are the attorneys-in-fact of Yotaro Fujino (also known as Yootaro Fujino), duly appointed under Power of Attorney dated February 20, 1941, recorded in Book 1633, Page 56, in the Bureau of Conveyances at Honolulu, T. H.; and that the foregoing instrument was executed in the name and behalf of said Yotaro Fujino (also known as Yootaro Fujino) by said Tokuichi Tsuda and Yasuo Tsutsumi as his attorneys-in-fact; and said Tokuichi Tsuda and Yasuo Tsutsumi acknowledged said instrument to be the free act and deed of said Yotaro Fujino (also known as Yootaro Fujino);

And on this 21st day of March, 1941, before me personally appeared Tokuichi Tsuda and Yasuo Tsutsumi, to me personally known, who, being by me duly sworn, did say that they are the attorneys-in-fact of Chiyono Fujino duly appointed under Power of Attorney dated December 23, 1940, recorded in Book 1633, Page 49, in the Bureau of Conveyances at Honolulu, T. H.; and that the foregoing instrument was executed in the name and behalf of said Chiyono Fujino by said Tokuichi Tsuda and Yasuo Tsutsumi as her attorneys-in-

Plaintiff's Exhibit H—(Continued)

fact; and said Tokuichi Tsuda and Yasuo Tsutsumi acknowledged said instrument to be the free act and deed of said Chiyono Fujino.

[Seal] /s/ ERNEST N. MURAKAMI,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

[Endorsed]: Filed C.C.A. Nov. 13, 1947.

PLAINTIFF'S EXHIBIT "I"

Know All Men by These Presents:—

That I, Kaname Fujino, of Honolulu, City and County of Honolulu, Territory of Hawaii (temporarily residing at Tokyo, Japan), have made, constituted and appointed and by these presents do hereby make, constitute and appoint Tokuichi Tsuda and Yasuo Tsutsumi, both of Honolulu aforesaid, my true and lawful attorneys-in-fact, jointly, for me and in my name, place and stead and for my use and benefit, to ask, demand, sue for, recover, collect and receive all such sums of money, debts, dues, accounts, legacies, bequests, interests, dividends, annuities and demands whatsoever as are now or shall hereafter become due, owing, payable or belonging to me, and have, use and take all lawful ways and means in my name or otherwise for the recovery thereof, by actions at law or in equity, attachments, or otherwise, and to compromise and agree for the same, and grant acquittances or other

sufficient discharges for the same, for me, and in my name to make, seal and deliver; to bargain, contract, agree for, purchase, receive and take lands, tenements and hereditaments and accept the seisin and possession of all lands and all deeds and other assurances in the law therefor; to lease, let, demise, bargain, sell, remise, release, convey, mortgage and hypothecate my lands or interests in land, tenements and hereditaments, upon such terms and conditions, and under such covenants, as they shall think fit; to vote at all meetings of any company or companies and otherwise to act as my representatives in respect of any shares now held or which may hereafter be acquired by me therein and for that purpose to sign and execute any proxies or other instruments in my name and on my behalf; to represent me in any and all matters coming before the Bureau of Internal Revenue, Washington, D. C., or any representative thereof, regarding the filing of annual income tax returns or delinquent or amended income tax returns or other returns or reports of [Liber 1633, Page 53] whatever nature, including claims for refund or credit, the payment of any and all taxes which may be due and payable and the receiving, indorsing and cashing of all checks received from the Treasury Department, Washington, D. C., or elsewhere, which may apply to the refunding of taxes or otherwise; to make and file such returns or reports as may be required by the Social Security Board and the Bureau of Internal Revenue, Washington, D. C., or which may be required by the Tax Commissioner of the Territory

of Hawaii, or any other governmental authority; also to bargain and agree for, buy, sell, mortgage and hypothecate and in any and every way and manner deal in and with goods, wares and merchandise, choses in action, and other property, in possession or in action, and to make, do and transact all and every kind of business of what nature and kind soever; and also for me and in my name and as my act and deed to sign, seal, execute, deliver and acknowledge such deeds, leases and assignment of leases, covenants, indentures, agreements, mortgages, hypothecations, bottomries, charter parties, bills of lading, bills, bonds, checks, notes, receipts, evidences of debt, releases and satisfaction of mortgages, judgments and other debts and such other instruments in writing of whatever kind or nature as may be necessary or proper in the premises.

Giving and Granting unto my said attorneys, jointly, full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might or could do if personally present with full power of substitution and revocation; and hereby ratifying and confirming all that my said attorneys, jointly, shall lawfully do or cause to be done by virtue of these presents.

In Witness Whereof, I have hereunto set my hand and seal this 12th day of December, 1940.

[Seal] /s/ KANAME FUJINO.

[Liber 1633, Page 54.]

Certificate of Acknowledgment of Execution
of Document

Empire of Japan, Prefecture of Tokyo,
City of Tokyo, Consulate General of the
United States of America—ss.

I, David Thomasson, Vice Consul of the United States of America at Tokyo, Japan, duly commissioned and qualified, do hereby certify that on this 12th day of December, 1940, before me personally appeared Kaname Fujino, to me personally known, and known to me to be the individual described in, whose name is subscribed to, and who executed the annexed instrument, and being informed by me of the contents of said instrument he duly acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein mentioned.

In Witness Whereof, I have hereunto set my hand and official seal the day and year last above written.

[Seal] /s/ DAVID THOMASSON,
Vice Consul of the United
States of America.

Service No. 5025.

Fee \$2.00 U. S. currency equal to Yen 8.76.

(American Consulate General, American Foreign Service. \$2.00 Dec. 12, 1940. Fee Stamp, Tokyo, Japan.)

Entered of Record this 3rd day of March, A.D. 1941, at 9:19 o'clock a.m. and compared. Mark N. Huckestein, Registrar of Conveyances. By, Clerk.

[Liber 1633, Page 55.]

[Endorsed]: Filed C.C.A. Nov. 13, 1947.

PLAINTIFF'S EXHIBIT "J"

Imperial Japanese Consulate General
Honolulu, T. H.

No. 528

December 2, 1941

To Whom It May Concern:

This is to certify that Kaname Fujino, according to the records of this office, was expatriated from the Japanese Nationality on January 19, 1939, by Notification No. 15 of the Ministry of Home Affairs.

[Seal] **CONSUL-GENERAL OF JAJAN**

Per /s/ **K. YUGE,**

Secretary.

[Endorsed]: Filed C.C.A. Jan. 31, 1947.

The undersigned endorser, for value received, hereby jointly and severally waive presentment, demand of payment and notice of non-payment, protest and notice of protest, and consent to substitution, change or withdrawal of securities, without notice, and to extensions of time of payment without notice.

Handwritten:
"K" Kinkaid
Admitted

Handwritten:
KANEKE R. FUJINO

\$ 15,000.00 Honolulu, T. H. March 13th 1941
- - On or before One Year - - after date, for value received.
- - We jointly and severally - -
promise to pay to the order of BISHOP NATIONAL BANK OF HAWAII at its office in
Honolulu, - - FIFTEEN THOUSAND & NO/100 - - DOLLARS.
with interest thereon from date hereof until fully paid, at six % per annum net over and
above taxes, interest and principal payable in lawful money of the United States of America,
interest payable monthly - -

If default shall be made in any payment of interest or principal, then at the option of the holder hereof without notice the entire debt shall immediately become due and payable together with a reasonable attorney's fee and costs of collection.

Secured by Mortgage PAID YOTARO FUJINO, CHIYONO FUJINO
dated March 13 1941 Oct 6 1943 By Tokuichi Tsuda
Yotaro Fujino
YOTARO FUJINO, CHIYONO FUJIN
By Yasuo Tsutsumi
ChiYono Fujino

REAL ESTATE
FORM NO. 1 APR 20 1937

Payments \$ Acct. Int. & Prin. MONTHLY
R.E. No. 9783B QUARTERLY
Date March 13th., 1941 Rate 8 1/2
Maturity March 13th., 1942

RECORD OF PAYMENTS MADE

DATE	INTEREST	TO	PAYMENTS	PRINCIPAL	BALANCE
JUN 20 1941		5th		15000 00	15000 00*
JUN 20 1941	35 33	7/5/41	1750 00		13250 00*
JUL 7 - 1941	35 33	7/5/41	164 67		13085 33*
AUG 1 - 1941	48 65	8/5/41	134 52		12950 81*
SEP 2 - 1941	75 64	9/5/41	135 25		12815 56*
OCT 2 - 1941	64 08	10/5/41	135 92		12679 64*
NOV 2 - 1941	63 40	11/5/41	136 60		12543 04*
DEC 2 - 1941	62 71	12/5/41	137 29		12405 75*
JAN 8 - 1942	62 03	1/5/42	137 97		12267 78*
FEB 8 - 1942	61 43	2/5/42	138 57		12129 21*
FEB 11 1942	28 64	3/5/42	8000 00		4129 21*
MAR 4 - 1942	28 64	4/5/42	171 36		3957 85*
APR 7 - 1942	18 05	5/5/42	180 21		3777 64*
MAY 4 - 1942	17 98	6/5/42	181 05		3596 59*
JUN 6 - 1942	17 10	7/5/42	182 02		3414 57*
JUL 1 - 1942	16 16	8/5/42	183 84		3231 67*
AUG 4 - 1942	15 24	9/5/42	183 84		3047 83*
SEP 2 - 1942	14 32	10/5/42	184 76		2863 07*
OCT 3 - 1942	13 39	11/5/42	185 68		2677 39*
NOV 4 - 1942	12 45	12/5/42	186 61		2490 78*
DEC 2 - 1942			187 55		2303 23*

PAYMENTS MADE ON WITHIN NOTE:

DATE	INTEREST	TO	PAYMENTS	PRINCIPAL	BALANCE
JAN 2 - 1943	11 52	1/5/43	188 48		2114 75*
FEB 2 - 1943	8 81	2/5/43	191 19		1923 56*
MAR 1 - 1943	8 01	3/5/43	191 99		1731 57*
APR 2 - 1943	7 21	4/5/43	192 79		1538 78*
MAY 1 - 1943	6 41	5/5/43	193 59		1345 19*
JUN 3 - 1943	5 60	6/5/43	194 40		1150 79*
JUL 1 - 1943	4 79	7/5/43	195 21		955 58*
AUG 1 8 1943	3 98	8/5/43	196 02		759 56*
SEP 3 - 1943	3 52	9/5/43	196 48		563 08*
OCT 4 - 1943	2 34	10/5/43	197 66		365.42*
OCT 6 - 1943			365.42		NIL

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LANDS

PAUL P. CORRELL

PLAINTIFF'S EXHIBIT L-1

Yotaro Fujino
No. 19, 3-Chome
Denenchofu
Omori-ku, Tokyo
Telephone—Denenchofu 2474

January 16, 1941.

Messrs. Oahu Junk Company

Gentlemen:

I wish to congratulate the good health of you all. Now, as for us, fortunately we are all well; so please do not worry about us.

I thank you for your cablegram which reached me on the 12th of this month, reading: "Son born to Mrs. Fujiaki and both doing well. Please do no worry." We are grateful to you for everything you have done for us. Our whole family was relieved of anxiety when we received your message that both of them are well. When you are so busy with work at the store I hesitate to ask you, but please continue to look after them, now that there are two children and will be depending upon you more and more.

You have repeatedly called my attention relative to scrap shipment to Nippon Kokan. However, I don't believe there is any other transaction as was heretofore carried on between Nippon Kokan and the Kyoyei Shokwai because the Scrap Iron Importation Control Company (Board) is concluding sales contracts following the customary practice of other scrap iron importers. I was told once or twice by the Mitsui Head Office that the Control

Company has been treating scrap iron from Hawaii as peculiar grade commodity and that the Control Company has been scheming to force the price (of Hawaii scrap) down to 100 yen per kilogram. I went to the Control Company, and, in the presence of its staff member, a man from Nippon Kokan, and Mr. Izawa of Mitsui at Yokohama, I explained that, during the last European War, the practice was to ship the scrap iron of Oahu Junk and Honolulu Junk to the continental United States and then to have it re-shipped to Japan by Americans. And I made a protest to the Control Company, which is under the supervision of the Japanese government, against its policy of doing things which bring hardship upon the Japanese doing business in foreign countries. Thereafter, by a virtual order of the Control Company, the Mitsui Head Office ceased handling Oahu Junk Company's scrap iron and Nippon Kokan commenced handling it.

As I reported to you previously, the Control Company told me that the two firms should get together, form a partnership and buy (scrap); that you should cooperate with the national policy by buying cheaply; that although it could hardly ask you to do this at a loss to yourselves, it wanted you to co-operate by shipping scrap iron to Japan as cheaply as possible. Indeed I was told by the Control Company that the government, at present, is supplying the factories at a loss of 60 yen per kilogram.

If one party should campaign for its own profit, I believe that both will suffer losses. Up to the

present time, Oahu Junk has been selling to Mitsui Bussan and others, and Kyoyei has been selling to Nippon Kokan. Consequently, Oahu Junk got after Mitsui by saying that Kyoyei got the better deal because it sold at the face amount of the Bill of Lading, without charges against it for cutting and with no deduction for shrinkage (loss of weight in transit); and, on the other hand, Kyoyei has been telling the Kokan that the prices received by Oahu Junk are higher than its prices. Thus each company was reaping its own share of profit. However, in order to ship cargo as the two companies have been doing in the past, I believe that you should hereafter go about it with a great deal of tact.

Please forgive me for my hasty writing. I pray for your good luck and health.

Yours respectfully,

P.S. As I have already received my power of attorney, I will immediately go to the American Consul, have it certified and will mail it to you.

The documents sent by you are as follows:

1 Trial balance for November last year

1 Copy of Articles of Incorporation

Memorandum of stockholders' names, number of shares and certified numbers

Four certificates of stock

Copy of cable

I acknowledge receipt of the above mentioned documents.

[Endorsed]: Filed Nov. 13, 1947.

PLAINTIFF'S EXHIBIT M-1

Yotaro Fujino

No. 19, 3-Chome

Denenchofu

Omori-ku, Tokyo

Telephone—Denenchofu 2474

February 20, 1941.

Messrs. Oahu Junk Company

Gentlemen:

Thank you very much for your wire dated February eighteenth: "Loaded 12 American tons of Peeling, 1½ American tons of Red Tube on Kamakura. Please insure. Let us know the price of 15 American tons of Peeling, 1 American ton of Red Tube and 1½ tons of Black (Tube) for March shipment. Have you sent your power of attorney? Unless you send (it), it is not possible to change (the ownership or title of) land to Master Kaname."

With reference to scrap rubber the situation is as already stated; however, I shall present the cablegram and shall negotiate once again for March shipment and you will be advised of the result later.

I hope that you will all take good care of yourselves.

With this, a hasty reply, I remain,

Yours very truly,

Written by: Takeo Fujino

Please accept power of attorney which I have enclosed herewith.

[Endorsed]: Filed Nov. 13, 1947.

UNITED STATES
GIFT TAX RETURN
CALENDAR YEAR 1941

(Space for use of Bureau)

(To be filed in duplicate with the Collector of Internal Revenue for the donor's district not later than the 15th day of March following the close of the calendar year)

DONOR Yotaro Fujino
(Given name) (Middle name or initial) (Surname)
ADDRESS 1217 No. King Street
CITIZENSHIP National of Japan
RESIDENCE Tokyo, Japan

UNITED STATES DISTRICT COURT OF SOUTHERN DISTRICT OF NEW YORK
FILED
PAUL P. O'BRIEN
CLERK

Have you (the donor), during the calendar year indicated above, without adequate and full consideration in money or money worth, made any transfer exceeding \$2,000 in value (or regardless of value if a future interest) as follows? (Answer "Yes" or "No")

1. By the creation of a trust (.....) or the making of additions to a trust previously created (.....). In either case for the benefit of a person or persons other than yourself, and with respect to which you retain no power to revoke the beneficial title to the property in yourself or to change the beneficiaries or their proportionate benefits; or by relinquishing every such power that was retained in a previously created trust (.....) no.
2. By permitting a beneficiary, other than yourself, to receive the income from a trust created by you and with respect to which you retained the power to revoke the beneficial title to the property in yourself or to change the beneficiaries or their proportionate benefits (.....) no.
3. By the purchase of a life insurance policy (.....) or the payment of a premium on a previously issued policy (.....), the proceeds of which are in either case payable to a beneficiary other than your estate, and with respect to which you retained no power to revoke the economic benefits in yourself or your estate or to change the beneficiaries or their proportionate benefits; or by relinquishing every such power that was retained in a previously issued policy (.....) no.
4. By permitting another to withdraw funds from a joint bank account which were deposited by you (.....) no.
5. By conveying title to another and yourself as tenants or to your wife or husband and yourself as tenants by the entirety (.....) no.
6. By the exercise or release of a power of appointment, except as provided in subparagraphs 1 through 5 of the instructions (.....) no.
7. By conveying community property to another, consisting commonly of property interest in property of your power or into a tenancy in entirety of yourself and spouse for other than your life, to the extent of your interest as set forth in the instructions (.....) no.
8. By any other method, direct or indirect (.....) no.

If the answer is "Yes" to any of the foregoing, such a transfer should be fully disclosed under schedule A.

COMPUTATION OF AMOUNT OF NET GIFTS FOR YEAR

1. Total included amount of gifts for year (item c, schedule A)	\$ 25,750.00
2. Total deductions for charitable, public, and similar gifts for year (item c, schedule B)	\$ -
3. Specific exemption claimed (see section 11 of instructions)	-
4. Total deductions (item 2 plus item 3)	-
5. Amount of net gifts for year (item 1 minus item 4)	\$ 25,750.00

COMPUTATION OF TAX (see section 15 of instructions)

1. Amount of net gifts for year (item 5, above)	\$ 25,750.00
2. Total amount of net gifts for preceding years (item c, schedule C)	-
3. Total net gifts (item 1 plus item 2)	\$ 25,750.00
4. Tax computed on item 3	708.75
5. Tax computed on item 2	-
6. Tax on net gifts for year without addition of defense tax	708.75
7. Defense tax (see second and third paragraphs, etc.)	70.88

8. Total tax payable for year (item 6 plus item 7) 779.63
I swear (or affirm) that this return, including the accompanying schedules and statements, if any, has been examined by me, and the best of my knowledge and belief, is a true, correct, and complete statement of all the information respecting the donor's gift tax liability for the calendar year stated, and no transfer required by said law and regulations to be returned other than the transfers or transfers disclosed herein under schedule A was made by me (the donor) during said calendar year.

NOTARIAL
SEAL

Sworn to and subscribed before me this
day of March, 19 42

(Signature of donor/executor/other person)

(Signature and title of officer administering oath)

(Address of person filing return)

AFFIDAVIT OF PERSON PREPARING RETURN

I swear (or affirm) that I prepared this return for the person named herein and that this return, including the accompanying schedules and statements, if any, is a true, correct, and complete statement of all the information respecting the donor's gift tax liability for the calendar year stated, and no transfer required by said law and regulations to be returned other than the transfers or transfers disclosed herein under schedule A was made by me (the preparer) during said calendar year.

NOTARIAL
SEAL

Sworn to and subscribed before me this
day of March, 19 42

(Signature of person preparing return)

(Signature and title of officer administering oath)

(Address of person preparing return)



- N

11, 15
10-2, and 16

SCHEDULE A—Total Gifts During Year (see sections 5, 6, 7, 8, 9, 10-2, and 16 of instructions)

ITEM No.	DESCRIPTION OF GIFT, AND DONEE'S NAME AND ADDRESS	DATE OF GIFT	VALUE AT DATE OF GIFT
	Date of Deed - March 21, 1941		\$
	KEY ADDRESS		
1	1-5-03-23 1217 No. King St.--Land & Building	3/31/41	12,600.
2	1-5-03-35 rear of 1217 No. King St.--Land & Building	3/21/41	7,450.
3	1-5-03-32 " " " " " " " "	3/21/41	3,550.
4	1-5-03-2 " " " " " " " "	3/21/41	1,250.
5	1-5-23-17 " " " " " " " "	3/21/41	3,000.
6	1-5-02-13 904 Waiakamilo Road " " "	3/21/41	1,900.
	Motive: Love and affection		
	Donee: Kaname Fujino		
	1217 No. King St.		
	Honolulu, Oahu		

(a) Total	\$4,000 in trust or	\$ 29,750
(b) Less total exclusions not exceeding \$4,000 for each donee (except gifts of future interests)		4,000
(c) Total included amount of gifts for year		\$ 25,750

SCHEDULE B—Deductions for Charitable, Public, and Similar Gifts During Year (see sections 10 and 13 of instructions)

ITEM No.	NAME AND ADDRESS OF DONEE, AND CHARACTER OF INSTITUTION	VALUE AT DATE OF GIFT
		\$

(a) Total	\$
(b) Less total exclusions not exceeding \$3,000 for each donee (except gifts of future interests)	
(c) Total deductions for charitable, public, and similar gifts for year	\$

SCHEDULE C—Returns, Amounts of Specific Exemption, and Net Gifts for Preceding Years (subsequent to June 6, 1932)

CALENDAR YEAR	COLLECTION DISTRICT IN WHICH PRIOR RETURN WAS FILED	AMOUNT OF SPECIFIC EXEMPTION	AMOUNT OF NET GIFTS
		\$	\$

(a) Totals for preceding years (without adjustment for reduced specific exemption)	\$	\$
(b) Amount, if any, by which total specific exemption, line a, exceeds \$30,000 (see section 14 of instructions)		
(c) Total amount of net gifts for preceding years (total, last column, line a, plus amount, if any, line b)	\$	\$

(If more space is needed, attach additional sheets of same size)

GIFT TAX

DONEE'S OR TRUSTEE'S INFORMATION RETURN OF GIFTS

Calendar Year 19____

(TO BE FILED IN DUPLICATE)

(Space for use of Collector
or Bureau)

RECEIVED

Donor's name Yotaro Fujino

Donor's address Tokyo, Japan

Donee's name Kaname Fujino

Donee's address 1217 No. King St., Honolulu

Trustee's name _____

Trustee's address _____

Item No.	Description of property received	Date of gift	Approximate value at date of gift
	Date of Deed - March 21, 1941		\$
	KEY ADDRESS		
1	1-5-03-23 1217 No. King St. Land & Bldg.	3/21/41	12,600.00
2	1-5-03-35 rear of 1217 No. King " " "	3/21/41	7,450.00
3	1-5-03-32 " " " " " " " " "	3/21/41	3,550.00
4	1-5-03-2 " " " " " " " " "	3/21/41	1,250.00
5	1-5-23-17 " " " " " " " " "	3/21/41	3,000.00
6	1-5-02-13 904 Waiakamilo Road " " "	3/21/41	1,900.00

Pursuant to the Gift Tax Regulations of the Treasury Department, I hereby give notice of the herein-described property received from the above-named donor, and certify that I have carefully read the instructions on the reverse side of this form and that all the information given herein is correct, to the best of my knowledge and belief.

(Signature) _____

(Designation) _____

(Address of donee's executor or administrator)

16-11708-7

Date March, 1942

N-3

T.H.
HONOLULU, ~~HAWAII~~

Mar 16 1942

~~XXXX~~ No. 1

19900X

BISHOP NATIONAL BANK

99400X

OF HAWAII AT HONOLULU

PAY TO THE ORDER OF COLLECTOR OF INTERNAL REVENUE

\$ 779.63

SEVEN HUNDRED SEVENTY NINE and 63/100

DOLLARS

Yotaro Fujino

By (s) T. Tsuda

By (s) Y. TSUTSUMI

For Deposit with the
BISHOP NATIONAL BANK OF H
at Honolulu
FOR CREDIT OF
THE TREASURER OF THE U.
F.H.KANNE
Collector of Internal R

PLAINTIFF'S EXHIBIT "O"

Mackay Radio
Radiogram
The International System

Received at 713 Bishop Street, Honolulu, T. H.,

1941 Sept 22 AM 6 45

Hu7sn Tokyo 12 22 213 PM

LC Oahujunk

Honolulu

BUJIKIKOKU KANAMEE SIRASE TUNE-
TOKUNNI KEKKONNO OIWAITOSITE GOH-
YAKUDORU OWATASIKOU

FUJINO

1941 SEP 22 AM 730

[Endorsed]: Filed C.C.A. Nov. 13, 1947.

PLAINTIFF'S EXHIBIT "P"

Minutes of Meeting of the Board of Directors of Oahu Junk Company, Ltd., Held at the Office of the Company at 1217 N. King St., Honolulu, T. H., on June 8, 1942, at 2:30 p.m.

Upon notice duly given, a meeting of the Board of Directors of Oahu Junk Company, Ltd., was held at the time and place above mentioned.

Present: Kaname Fujino, Tokuichi Tsuda, Yasuo Tsutsumi, Mitsugi Maneki, Shizue Maneki, by proxy;

Absent: Tadashi Fujiaki, Katsue Fujiaki.

The meeting was called to order by Kaname Fujino, President. He explained the purpose of the meeting and then the matter was referred over to T. Tsuda, Vice-President. T. Tsuda then further explained that the license to transfer 110 shares of Y. Fujino's stock to the Company as recorded in the minutes of May 15, 1942, has been denied by the Foreign Funds Control. T. Tsuda stated that since the license has been denied and that the money had to be raised for Y. Fujino in order to make his 1940 additional tax payment due to the United States Government, he suggested that the Company make an advance of \$3,541.53 to Y. Fujino upon the security of savings account balance with the Yokohama Special Bank at Honolulu, and also to make an advance to Kaname Fujino of \$8,000 upon his written agreement to apply the monthly rental of \$300 due him from the Company together

with the security of savings account with the Pacific Bank in the sum of \$1,515.38 in the name of Kaname Fujino; then to have Kaname Fujino pay the \$8,000 advanced to him by the Company to his father, Y. Fujino in part payment of his indebtedness so as to enable his father to pay said taxes.

After some discussion, Y. Tsutsumi moved that the above mentioned advances be made by the Company. The motion was seconded by M. Maneki and was unanimously carried.

There being no further business, the meeting was duly adjourned at 3:30 p.m.

Dated: Honolulu, T. H., June 8, 1942.

[Seal] /s/ SHIZUE MANEKI,
Secretary.

[Endorsed]: Filed C.C.A. Nov. 13, 1947.

PLAINTIFF'S EXHIBIT "Q"

Mackay Radio
Radiogram
The International System

Received at 713 Bishop Street, Honolulu, T. H.
1941 Mar 21 AM 7:04

HU333SN WASHINGTON DC 19 21 1201 PM
LC BEMKUMI

HONOLULU

MUST KNOW ULTIMATE CONSUMER AND
PURPOSE FOR WHICH OAHUS SHIPMENT
REQUIRED BEFORE MAKING LICENSE AP-
PLICATIONS BUTLER

[Endorsed]: Filed C.C.A. Nov. 13, 1947.

PLAINTIFF'S EXHIBIT "R"

Mackay Radio
Radiogram
The International System

Send the following Message, subject to the terms
on back hereof, which are hereby agreed to

3/24/41

LC
RELTUB
WASHINGTONDC

ULTIMATE CONSUMER OF BARS AND
FLAT IRON SHINKO AIRCRAFT KOOGYO-
SHO NUMBER 291 SHIMURA AZUKIZAWA
ITABASHIKU TOKYO FOR REPAIRING
SHOP WAREHOUSE

MURAKAMI

[Endorsed]: Filed C.C.A. Nov. 13, 1947.

PLAINTIFF'S EXHIBIT "S"

Know All Men by These Presents:

That I, Chiyono Fijuno, wife of Yootaro Fujino,
of Honolulu, Hawaii, in consideration of the sum of
One Dollar (\$1.00) to me paid by my son, Kaname
Fujino, of the same place, receipt whereof is hereby
acknowledged, and of the love and affection which
I have for him, do hereby grant, bargain, sell and
convey unto the said Kaname Fujino, and his heirs
and assigns, all of the following described real
property:

All of that certain piece or parcel of land (comprising portion of the lands described in Royal Patent 2082, Land Commission Award 2222, Apana 2, to Kapalu, and Royal Patent 2081, Land Commission Award 1979, Apana 1 to Hiku), situate, lying and being at Waipilopilo and Kalanakila, Kapalama, Honolulu, City and County of Honolulu, Territory of Hawaii, and thus bounded and described:

Beginning at a pipe at end of fence, at the East corner of this piece, the coordinates of said point referred to Government Survey Triangulation Station "Punchbowl" being 4368.8 feet South and 6211.7 feet East, and running by true azimuths:

1. 52° 14' 14.00 feet to a pipe at fence corner;
2. 62° 36' 132.90 feet along fence, along L.C.A. 2222:3 to Kapalu to a pipe;
3. 146° 45' 80.60 feet along fence to a pipe in concrete;
4. 146° 15' 119.60 feet along Kuauna, along the Northeast side of Auwai to a stake;
5. 232° 28' 70.45 feet along old fence line to a stake;
6. 326° 57' 112.50 feet along remainders of L.C.A. 2222:2 to Kapalu, and 1979:1 to Hiku to a stake at fence corner;
7. 242° 46' 98.90 feet along fence;
8. 339° 14' 97.40 feet along fence to the point of beginning, containing an area of 23,018 square feet, and being the same premises conveyed to me by the following deeds:
(a) Deed from Yim Shee to Chiyono Fujino and Tome Chiogioji dated Oct. 7, 1927, recorded in the Office of the Registrar of Conveyances in Book 903, at Page 325, and
(b) Deed from Tome Chiogioji to Chiyono Fujino dated May 1, 1930, recorded in said Office in Book 1065, at Page 104.

Saving and Reserving from the operation of this deed the right on my part to receive and collect and appropriate to my own use all of the rents, issues and profits of the land hereby conveyed for and during the term of my natural life.

To Have and to Hold the same, together with all the rights, easements, privileges and appurtenances thereunto belonging or appertaining or held and enjoyed therewith, unto the said Kaname Fujino, and his heirs and assigns, to his and their own use and behoof forever, except as aforesaid.

And Yootaro Fujino, husband of Chiyo Fujino, in consideration of the premises and of the sum of One Dollar (\$1.00) to him paid does hereby release and [Liber 1259, Page 472] quitclaim unto said Kaname Fujino, and his heirs and assigns, all of his right, present or prospective, in and to the above described property.

In Witness Whereof, the Grantor and her husband have hereunto set their hands this 12th day of December, 1934.

/s/ CHIYONO FUJINO

(Japanese characters)

/s/ YOOTARO FUJINO

Witness:

/s/ F. KONDO

Territory of Hawaii,
City and County of Honolulu—ss.

On this 12th day of December, 1934, before me personally appeared Chiyono Fujino and Yootaro Fujino, her husband, to me satisfactorily proved to be the persons described in and who executed the foregoing instrument, by the oath of F. Kondo, a credible witness for that purpose, to me known and by me duly sworn; and the said Chiyono Fujino and Yootaro Fujino severally acknowledged to me that they executed said instrument as their free act and deed.

[Seal] /s/ ABEL M. YAMASHITA,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

Entered of Record this 13th day of December,
A. D. 1934, at 3:34 o'clock p.m. and compared.
Carl F. Wikander, Registrar of Conveyances. By
....., Clerk.

[Liber 1259, Page 473]

[Endorsed]: No. 11786. United States Circuit
Court of Appeals for the Ninth Circuit. Kaname
Fujino, Appellant, vs. Tom C. Clark, Attorney Gen-
eral of the United States, Appellee. Transcript of
Record Upon Appeal from the District Court of
the United States for the Territory of Hawaii.

Filed November 13, 1947.

 /s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 11786

KANAME FUJINO,

Appellant,

vs.

TOM C. CLARK, Attorney General of the United
States as Successor to the Alien Property
Custodian,

Appellee.

STATEMENT OF POINTS

Appellant intends to rely on the following points
on appeal:

- (1) The Court erred in holding that appellant was a national of a foreign country within the meaning of Section 5(b) of the Trading With the Enemy Act (50 U.S.C. App. Section 5(b) and Executive Orders Nos. 8389 and 9095;
- (2) The Court erred in holding that the real property involved was held for an enemy within the meaning of Section 7(c) of the Trading With the Enemy Act;
- (3) The Court erred in holding that the real property involved was held on behalf of an enemy country or a national thereof within the meaning of Section 5(b) of the Trading With the Enemy Act, and Executive Orders Nos. 8389 and 9095;

- (4) The Court erred in holding that the deed of gift dated March 21, 1941, from Yotaro Fujino to appellant was a nullity as against the United States;
- (5) The Court erred in holding that appellant has no interest, right or title in the real property involved within the meaning of Section 9(a) of the Trading With the Enemy Act;
- (6) The Court erred in placing such a burden of proof upon appellant seeking to recover real property of which he is the record owner as to amount to a deprivation of his property without due process of law, contrary to the Constitution of the United States, Amendment V.

Dated: Honolulu, Hawaii, January 22, 1948.

/s/ GARNER ANTHONY,
Attorney for Appellant.

Of Counsel:

ROBERTSON, CASTLE & ANTHONY,
312 Castle & Cooke Building,
Honolulu 1, Hawaii.

[Endorsed]: Filed Jan. 26, 1948.

No. 11,786

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

KANAME FUJINO,

Appellant,

vs.

TOM C. CLARK, Attorney General of
the United States,

Appellee.

On Appeal from the District Court of the United States
for the Territory of Hawaii.

BRIEF FOR KANAME FUJINO, APPELLANT.

J. GARNER ANTHONY,

WILLIAM F. QUINN,

312 Castle & Cooke Building, Honolulu, Hawaii,

Counsel for Appellant.

ROBERTSON, CASTLE & ANTHONY,

312 Castle & Cooke Building, Honolulu, Hawaii,

Of Counsel.

FILED

MAY 12 1948

PAUL P. O'BRIEN,

CLERK

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No. 11,786

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

KANAME FUJINO,

Appellant,

vs.

TOM C. CLARK, Attorney General of
the United States,

Appellee.

On Appeal from the District Court of the United States
for the Territory of Hawaii.

BRIEF FOR KANAME FUJINO, APPELLANT.

OPINION BELOW.

The opinion of the District Court is reported in 71 F. Supp. 1, and is found in the record on pages 49-62.

JURISDICTION.

The jurisdiction of the United States District Court for the Territory of Hawaii is founded upon Section 9(a) of the Trading With The Enemy Act, 50 U.S.C. Appendix, Section 9(a), and upon Section 86 of the Hawaiian Organic Act, Act of April 30, 1900, c. 339 as amended; 48 U.S.C. Section 642.

The jurisdiction of this court rests upon the Judicial Code, Section 128, amended; 28 U.S.C. Section 225, and upon Section 86 of the Hawaiian Organic Act, Act of April 30, 1900, c. 339 as amended; 48 U.S.C. 642.

Judgment was entered in the District Court on June 5, 1947 (R. 60) and notice of appeal was filed on August 30, 1947 (R. 444).

QUESTIONS PRESENTED.

(1) Can the property of a citizen of the United States which he received by deed of gift from his father (an enemy alien) on March 21, 1941, be seized by the Alien Property Custodian on the ground that the authority of the father's agent was not recorded, where the undisputed testimony shows that the agent did in fact have authority and the gift was regarded as complete and irrevocable by the parties to the transaction?

(2) Is a transfer of property colorable where there was no express or implied agreement between donor and donee that the latter would hold the property for the donor, nor any means whereby the donor could recover the property?

(3) Should the Trading With The Enemy Act be construed to require a citizen of the United States to prove more than that he is not an enemy or ally of an enemy in order to recover property seized by the Alien Property Custodian in which he has an interest?

**CONSTITUTIONAL PROVISION, STATUTES
AND ORDERS.**

The pertinent provisions of the Constitution, federal and territorial statutes, and executive orders appear in the Appendix.

STATEMENT OF FACTS.

In 1935, appellant's father, Yotaro Fujino, a Japanese alien, owned as sole proprietor two businesses in Honolulu (the Oahu Junk Company, and the Oahu Lumber and Hardware Company), which were conducted on land which is the subject of this action (R. 71, 72, 120). He had three employees, Tsuda, Tsutsumi and Yamamoto. In 1935, Yotaro Fujino returned to Japan, leaving Tsuda and Tsutsumi his agents to run the business (R. 75). At this time he mentioned his desire to incorporate the businesses at some future time, and to give the real property to appellant Kaname Fujino, his son (R. 80, 418). Yotaro returned to Hawaii once more, in 1935, remaining about one month in the status of a merchant (R. 73). Since then he has resided in Japan and has never returned to the United States.

Yotaro Fujino had three children—two girls and appellant Kaname Fujino (R. 85). Kaname was born in Hawaii on February 23, 1919, and is a citizen of the United States (R. 142, 147). The two girls are citizens of the United States and are four and five years older than Kaname (R. 181). Kaname was expatriated from Japan in November 1939, by official

act of the Imperial Government so that his citizenship in the United States is exclusive (R. 147, Ex. J, R. 513). He visited Japan once when he was a child and attended school there for six years from 1934 to May, 1941, when he returned to Honolulu (R. 144).

The businesses of the Oahu Junk Company and the Oahu Lumber and Hardware Company were conducted by Tsuda and Tsutsumi, subject to written **advices** received from Yotaro Fujino. (R. 79). Yotaro wrote only in Japanese, and Yamamoto was the **translator** of his letters who conveyed his instructions to Tsuda and Tsutsumi (R. 75). Yamamoto was also Yotaro's trusted adviser, who was consulted by the attorneys in fact on matters of policy (R. 368).

In 1939, while Yamamoto was in Japan, Yotaro discussed with him the desirability of incorporating the companies and of conveying the land here in question to appellant by deed of gift. Again in 1940, Yotaro's attorney, Robert Murakami (a member of the Bar of Hawaii) was in Japan and the same subject was discussed (R. 418). Murakami told Yotaro that under the Japanese law neither appellant nor his sisters would inherit Yotaro's personalty in Hawaii since Kaname was expatriated and the girls had married (R. 85). He also pointed out the advantages of distributing property by *inter vivos* gift (R. 83). Yotaro decided that he would incorporate the businesses and distribute the stock to the children (R. 87). To prevent dissipation he decided to require his children to give him a promissory note for the purchase price of the stock (R. 87, 118). His attorney

advised him that he could then waive a part of the note in any year and enjoy a tax exemption. Yotaro declared that he did not desire to include the land (the subject of this case) as an asset of the corporation, but wanted to give this property to appellant outright (R. 88, 297).

In 1940, Yotaro instructed Yamamoto to proceed with the incorporation of the business and with the conveyance of the land to his son, the appellant. These instructions were read to Tsuda and Tsutsumi by Yamamoto (R. 264, 374). In November, 1940, the corporation was formed and thereafter the attorneys in fact, acting under the power of 1935, transferred all the assets of the Oahu Junk Company and the Oahu Lumber and Hardware Company (exclusive of the land here involved) to the corporation in consideration of the issuance of shares to members of the Fujino family and the assumption by the corporation of the business debts of Yotaro (R. 90-95). A power of attorney authorizing Tsuda and Tsutsumi to act for appellant was prepared and executed in Japan by appellant so that the attorneys in fact could receive the 200 shares issued to him and execute a note for \$20,000 to Yotaro on appellant's behalf (R. 133).

At the time of the incorporation Yotaro owed the Bishop National Bank of Honolulu the sum of \$20,000, which debt was assumed by the corporation (R. 95). However the bank had security for only \$1500 of the above sum. It required an additional security interest in Yotaro's real estate, being unwilling to rely entirely on the credit of the corporation since the

latter did not obtain the real property in the sale (R. 98).

Some of Yotaro's real estate was held in his name as Yotaro Fujino, and other parcels were held under the name of Yootaro Fujino. Tsuda and Tsutsumi held two powers of attorney from Yotaro, dating back to 1935, one in each of the foregoing names. In order to clear up the confusion in names and the multiplicity of powers, Tsuda and Tsutsumi obtained a new power from Yotaro referring to the fact that he was also known as Yootaro. The purpose of the attorneys in fact in obtaining the new power was to execute the mortgage to the bank and the deed of gift subject to the mortgage to appellant (R. 95, 340). The record is clear that Yotaro knew of these plans and executed the power in the belief that he was conferring authority upon his agents to execute a deed of gift of his real property (R. 418-421). The power of attorney authorized the attorneys in fact to "sell, mortgage, hypothecate, pledge, lease and otherwise dispose of, and every way and manner deal with real property" (Ex. E, R. 480). The mortgage (Ex. G, R. 488) was executed and the deed to Kaname drawn in March, 1941 (Ex. H, R. 501). The deed was left at the bank to be picked up by appellant on his return to Hawaii. The bank also requested appellant's endorsement on Yotaro's note so that it would have his personal liability as security, as well as his real property (R. 156, 210, Ex. K, R. 514). In May 1941, appellant returned from Japan, endorsed the note at the bank and took delivery of his deed and had it recorded. He later returned it to the bank as mortgagee (R. 153).

In the spring of 1941, Yamamoto went to Japan, where he reported to Yotaro that his wishes with regard to the conveyance had been carried out (R. 420). Yamamoto died in Shanghai in August of 1941 (R. 396).

Immediately after December 7, 1941, Mrs. Yamamoto was frightened and burned all the Japanese documents, papers and books which Yamamoto had left at his home (R. 399). It was his custom to keep some correspondence there (R. 398) and presumably Yotaro's written instructions to Yamamoto to complete the conveyance to appellant were destroyed at this time (R. 265-268).

When appellant returned to Honolulu he attended the university and worked part time at the Oahu Junk Company, Limited (R. 184). In August, 1941, it was agreed that the corporation should pay appellant \$300 per month rent and assume the taxes and repairs. This figure was suggested by Tsuda and Tsutsumi and accepted by appellant (R. 185, 189). Then the corporation paid Kaname \$1800 for the first six months' rent, i.e., March through August, 1941 (R. 205).

From time to time Kaname helped out his sisters, who were in Hawaii, when they were in need of funds (R. 182, 213). In 1941, Oahu Junk Company, Limited, received instructions from Yotaro to make a wedding gift of \$500 to Tsutsumi's younger brother (R. 226). Appellant made this gift from his own funds considering that it was a family obligation and that

he, as the man of the family in Hawaii, should make the family gift (R. 190).

In June, 1942, Yotaro owed back income taxes in the amount of \$11,800. Tsuda and Tsutsumi attempted to obtain a license through Foreign Funds Control to obtain certain of Yotaro's assets in order to pay off this liability. The license was refused. Thereupon an arrangement was made whereby the Oahu Junk Company, Limited, would put up \$3,800 and would lend another \$8,000 to appellant, setting off as security the future \$300 monthly rent payments (R. 276, 277). Tsuda and Tsutsumi, as attorneys in fact for Yotaro, credited appellant with an \$8,000 payment on his \$20,000 note, which Yotaro held for the purchase of the Oahu Junk Company, Limited, stock (R. 279). Other than such uses to which the rentals of the land were put, from which it may be said that Yotaro received some benefit, there is no evidence of any undertaking on the part of appellant to hold the land for Yotaro or to put the proceeds thereof to any particular use (R. 158, 184). Nor is there any evidence that appellant felt bound to give money to his adult sisters, to give a wedding present to a family friend, or to see that his alien father's taxes were paid, except by such duty as an adult son would normally feel to act as his parent would want him to act, so long as his own self interest did not dictate to the contrary (R. 190, 207, 218).

On these facts the Alien Property Custodian, in Vesting Order No. 2724, determined that appellant did not own the realty, that he held it for his father's

use and benefit, and that he (Kaname) was so controlled by his father as to be a national of Japan. The custodian, therefore, vested title to the property in himself.

SUMMARY OF ARGUMENT.

The District Court held that the power of attorney dated February 20, 1941 (Ex. E, R. 479) executed by Yotaro Fujino, gave no authority to his attorneys in fact, to make a gift to appellant and that unrecorded authority was ineffective as against the Alien Property Custodian, and therefore that appellant has no "interest, right or title" in the real property within the meaning of Section 9(a) of the Trading With The Enemy Act; that the land was held for the benefit of an enemy not holding a license within the meaning of Section 7(c) of the Act, and finally that appellant himself was "a national of a foreign country" within the meaning of Section 5(b) of the Act, and Executive Orders Nos. 8389 and 9095. Thus the District Court held that even if appellant was the legal owner of the land, nevertheless the seizure by the Alien Property Custodian was lawful, and appellant has no remedy in the courts.

The District Court erred in construing the Hawaiian recording act (Revised Laws of Hawaii, 1945, Sec. 12757) as protecting the Alien Property Custodian, and in finding that the Custodian acquires rights greater than those of the alien whose interest he seized. Since the deed of gift was (as between

donor, his agent, and donee) admittedly fully authorized, and was executed, delivered, accepted and recorded, the gift is irrevocable. The donor cannot recover the property and neither can the custodian as the successor in title of the donor's interest.

Thus, appellant had an interest in the land unless such legal interest was merely colorable. The court erred in finding that there was such a reservation of control by Yotaro Fujino as to render the transfer colorable and appellant's interest insufficient to support the action. The acts of a son observing natural amenities such as assisting his sisters and making a wedding present to a son of his father's friend do not constitute control of appellant so as to deprive him of his property lawfully acquired and held.

Finally, the court erred in finding that appellant, a citizen of the United States, was subject to such control by his alien father as to justify the Alien Property Custodian's determination that appellant himself was a national of Japan within the meaning of Section 5(b) of the Act. The District Court was clearly in error in placing upon appellant the burden of showing not only that he was an enemy or ally of an enemy within the meaning of Section 9(a) of the Act, but also that he was not a national of Japan as the term is used in Section 5(b) as construed by the Alien Property Custodian. The Trading With The Enemy Act does not require such proof as a condition precedent to recovery and the District Court misconstrued the act. If so applied, to a citizen of the United States, the act is unconstitutional as authorizing the

seizure of private property without just compensation and a denial of due process of law guaranteed by the Fifth Amendment.

ARGUMENT.

I. APPELLANT HAS A "RIGHT, INTEREST OR TITLE" IN THE LAND.

A. The land was transferred to him by deed of gift executed by attorneys in fact having recorded authority to act.

It is undisputed that since 1935, Yotaro Fujino has considered making a gift of his real property in Hawaii to appellant; that it was discussed with his business advisor in 1939, and with his lawyer in 1940; that he wrote in 1940 telling his attorneys in fact to consummate the gift; and that he executed a new power of attorney in 1941, the object and purpose of which was to authorize his attorneys in fact to make the contemplated conveyance (Ex. E). The power of attorney was duly recorded. The sole question is whether the recorded power of attorney, properly construed, was sufficient to attain the object for which it was drafted. Applying the rules for the interpretation of written instruments,¹ did the authority contained in the power of February 20, 1941, include authority to make a gift of land?

The trial court answered the above question in the negative, applying the well established rule of inter-

¹Powers of attorney are interpreted in accordance with the rules governing the interpretation of writings generally. See 2 *Am. Jur.*, "Agency", Sec. 31; *Soders v. Armstrong*, 172 Okla. 50, 44 P. (2d) 868 (1935).

pretation that an agent asserting the power to give away an asset of his principal must show that such power has been expressly conferred (R. 56). Construing one of the operative phrases in the power, the court held that the term "otherwise dispose of" is limited by the specifications preceding it. Furthermore (said the court) this power, read as a whole, was authority to run a business, and a gift is not a business transaction. We contend that the court erred by failing to apply basic principles applicable for ascertaining the intent of a written instrument.

The significant and distinguishing fact here is that all the parties to the transaction agreed on the interpretation which should be given to the written power. They are unanimous in their testimony that the power in question was intended to grant authority to make the gift, and that the attorneys acted with their principal's knowledge and approval. Cases involving disputes between principal and agent, or principal and third persons are inapposite.² Such cases construe a written power strictly to protect a principal who has tried to protect himself by reducing his agent's authority to writing. Here principal and agent agree as to the extent of authority conferred, but the appellee and the court below take the position that they didn't say what they meant to say.

The standard of interpretation applicable to this document in the first instance is—

²See *Kaaukai v. Anahu*, 30 Haw. 226 (1927); *Brown v. Laird*, 134 Ore. 150, 291 Pac. 352 (1930); and other authorities cited by the trial court (R. 56).

the ordinary meaning of the writing to parties of the kind who contracted at the time and place where the contract was made, and with knowledge of such circumstances as surrounded its making.³

Exhibit E contains authority—

to hold, sell, mortgage, hypothecate, pledge, lease, and otherwise dispose of, and in any and every way and manner deal with real property.

and also authority to—

remise, release and quitclaim to all my estate, right, title and interest including any curtesy in any property of whatsoever kind and nature.

Would not a reasonable man, knowing of Yotaro's past statements concerning the disposition of his Hawaiian real estate, knowing that one of the purposes of the power was to enable Tsuda and Tsutsumi to execute a deed granting the land to appellant, would not such a man, knowing all the circumstances, be compelled to say that the power to deal "in any and every way and manner" with the real estate included the power to give it away? The purpose of interpretation is to give effect to the intention of the parties. So long as the language used permits, that construction should be adopted which supports instead of defeats the purposes of the instrument.⁴

³*Williston on Contracts*, Sec. 607 (Rev'd ed. 1936).

⁴² *Am. Jur.*, "Agency", Sec. 31; see *Lathrop v. Wood*, 1 Haw. 121 (1852).

There is no rule of law requiring a principal seeking to grant his agent the power to make a gift to state that power in express and separate words. That rule is one of interpretation. And, like the rule of *ejusdem generis*, it is a secondary rule, not to be applied if the meaning of the writing is disclosed from the primary sources of information, i. e., from the words themselves and the circumstances surrounding its execution.⁵ Again, it is clear that in the first instance the general words of authority in Exhibit E must be considered in the illuminating circumstances of its execution and purpose, unembarrassed by artificial rules of interpretation, which should only be applied when the writing as regarded by the above standard of interpretation is ambiguous. Thus it is that the authors of the American Law Institute can say—

Unless otherwise agreed, authority to sell does not include authority to mortgage the subject matter, * * * (or) to make a gift of it * * *⁶

The power here includes authority not only to sell but also to otherwise dispose of realty and to deal with it in any and every way. Read in the light of the circumstances, it is too clear for argument that the parties have agreed that the powers so broadly expressed include the power to make a gift. That power has been recorded, so that even if the Alien Property

⁵³ *Williston on Contracts*, Sec. 609; see *H. Hackfeld & Company v. Grossman*, 13 Haw. 725 (1902).

⁶*Restatement, Agency*, Sec. 65, subs. (1), comment (a).

Custodian were a third person within the Hawaiian recording act⁷ he would be bound by notice of the agent's authority to make a gift.

Even if the court were to find that the instrument here, viewed with all the circumstances and the object of the power in mind, does not clearly contain the power to make a gift, it is manifest that the words used may confer such a power and that the instrument is at least ambiguous as to whether the power is in fact granted. The trial court must have treated the writing itself as ambiguous because he found it necessary to advert to certain rules for interpretation which are not to be applied if the expressed written intention of the parties is clear. Applying the principle that the writing must be read as a whole, the court held that the power here was given for a business purpose and a gift is not a business transaction.

The powers given to Tsuda and Tsutsumi under Exhibit E are as broad as language could make them. Rather than a power to run the Oahu Junk Company's business, it is a power to act as the *alter ego* of Yotaro in Hawaii. Certainly this broadest of powers should not be held to limit wide grants of authority contained in it. On the other hand, the court ignored the circumstances in which the power was executed⁸ and the purpose of the parties in the

⁷Revised Laws, Hawaii, 1945, Sec. 12757.

⁸See 3 *Williston*, Sec. 618, wherein Professor Williston takes the position that these circumstances may always be shown as a primary rule of interpretation,

execution.⁹ In addition, the court rendered the words “and otherwise dispose of, and in any and every way and manner deal with real property” nugatory by applying the rule of *ejusdem generis*. That rule is not one to defeat intention, but rather one to aid in determining intention. If it appears to have been the intention of the parties to include other things not *ejusdem generis* in general words, the courts give effect to that intention,¹⁰ particularly where, as here, the words would otherwise be meaningless.¹¹

Yotaro gave Tsuda and Tsutsumi the power to otherwise dispose of and in every and any manner deal with his real property, intending that they should be authorized to grant the land in question to Kaname. We submit that this language reasonably construed clearly carries out Yotaro’s intention, or if ambiguous, that it should be interpreted to do so. The acts and declarations of the parties demonstrate that such was the interpretation given the power by the parties themselves. This interpretation should be adopted by the court.¹²

⁹Ibid., Sec. 619.

¹⁰*Lindeke v. Associates Realty Co.*, 146 Fed. 630, 638 (1906); *Hoffman v. Eastern Wisconsin Ry. & Light Co.*, 34 Wis. 603, 115 N. W. 383 (1908); *Webb v. Missouri State Life Ins. Co.*, 134 Mo. App. 576, 115 S. W. 481 (1909).

¹¹See *Webb v. Mo. St. Life Ins. Co.*, supra, at page 482; and see 3 *Williston*, Sec. 619, note 2.

¹²3 *Williston*, Sec. 623, and collection of cases in note 2 thereof.

B. Even if the power to convey by gift was not contained in the recorded power of attorney, the gift to appellant was valid against Yotaro Fujino and appellee.

Assuming, *arguendo*, that the trial court's interpretation of the recorded power of attorney (Exhibit E) was correct, he was nevertheless in error in finding that appellant has no interest in the land. Yotaro wanted his agents to transfer the land to his son. He expressed this desire to his attorney, and he wrote a letter to the Oahu Junk Company directing it. Unfortunately the translator of the letter is deceased and the letter was destroyed. But no evidence has been offered to contradict the fact. The court below recognized that there were "unrecorded, relayed directions by letter and cable" to the attorneys in fact (R. 57), but held that such instructions were ineffective as against a third party.

This raises two questions:

Is appellee a "third party" so as to be protected by the Hawaiian recording act?¹³

Does this act protect third parties who have not paid value?

We answer both questions in the negative. The Alien Property Custodian's interest is exactly that of the alien whose interest he vested. If the gift is irrevocable as between Yotaro and Kaname, it is likewise enforceable against the custodian. Furthermore,

¹³Revised Laws, 1945, Sec. 12757 provides: "All * * * powers of attorney for the transfer of real property within the Territory shall be recorded in the Bureau of Conveyances, in default of which no such instrument shall be binding to the detriment of third parties and conclusive upon their rights and interests."

we contend that the Hawaiian recording act protects only purchasers for value and that the Alien Property Custodian does not fall within this category.

Yotaro authorized his agents in writing to convey the land to appellant. His donative intent was present and the land was delivered to and accepted by Kaname. Yotaro himself could not recover the land, because the gift was complete. Is the Alien Property Custodian in a better position?

Section 7(c) of the Trading With The Enemy Act¹⁴ states that property belonging to or held for "an enemy or ally of an enemy not holding a license granted by the President * * * shall be conveyed * * * to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian". Disregarding for the moment the question whether appellant held the property for Yotaro even though he had legal title, the problem now under consideration is what did Yotaro have that the custodian could seize? He had no property interest in the land. He had no power to recover the property from Kaname. He had a power at most to convey to a third person for value, in which case the recording act would prevent appellant from asserting his title. That power is not property. By its exercise, Yotaro could under certain circumstances create greater rights in another than he himself had. The Trading With The Enemy Act contemplates the seizure of property which would aid the enemy in war if unseized. It requires the alien

¹⁴50 U.S.C. App. 7 (c).

to transfer property of that type to the custodian, and empowers the latter to seize the property in the event of failure or refusal to transfer. In other words, property passes from the alien to the custodian either voluntarily or involuntarily. But in this case nothing could be taken from Yotaro because he had nothing. The real property belonged to appellant, a United States citizen, and presumably could not be utilized to aid the Japanese in the war. If Yotaro exercised his power under the recording act to create a superior title in a third person who was an enemy, the custodian could force a transfer of that title from the enemy to himself. But, we submit, the custodian could not force Yotaro, who had nothing, to exercise his power to create a title in the custodian to defeat the existing title in appellant, a citizen of the United States.

There is one case which might indicate that the custodian's rights are broader than those of the enemy from whom he obtained them. In *Lizrodt v. Miller*,¹⁵ an American debtor of any enemy sought to recover from the custodian the difference in dollar value of the amount of the debt in marks when the custodian enforced payment to him, and the date when the debt could have been legally paid after the end of the war, the mark having declined in value considerably by the latter date. The court recognized that the custodian "was substituted in Donner's (the alien's) place by the seizure", but held that it was necessary to the administration of the statute to allow the custodian to

¹⁵17 F. (2d) 533 (CCA 2d, 1927).

demand payment in dollars rather than marks, and that this was within the war powers of Congress. This decision is clearly sound. But it is noted that no rights of friendly third parties were involved. Nor does the case stand for the proposition that the custodian receives greater rights than the enemy whose property he seizes, except that he need not take performance in the country with which we are at war.

Where friendly persons assert an interest in the property, the courts have been careful to preserve their rights and to hold the custodian subject to the same liabilities as his predecessor in title. Thus an American partner of an enemy was entitled to assert an equitable lien on American partnership assets to see that they were applied to American debts, and to liquidate his partnership interest. Only the resultant enemy interest was allowed to be seized.¹⁶ And where the custodian vests the interest of an enemy in securities held in trust, the capture was held not to change the character of the enemy's right. If the enemy was subject to the trustee's right of accounting, so also was the custodian.¹⁷ And an agent claiming a lien against the property of his enemy principal may assert the lien against the custodian.¹⁸ The above cases demonstrate that the custodian, instead of being in the position of a third party, stands in the shoes of the alien enemy and can assert no greater rights.

¹⁶*Mayer v. Garvan*, 270 Fed. 229, mod. 278 Fed. 27 (1920).

¹⁷*Kahn v. Garvan*, 263 Fed. 909 (1920).

¹⁸*Standard Oil Co. of N. J. v. Markham*, 64 F. Supp. 656 (1945).

An even stronger case conclusively shows that the custodian is bound by the enemy's title and cannot assert greater rights to the detriment of friendly persons. A citizen of the United States declared a trust in favor of an enemy. The custodian seized the property. The enemy did not learn of the trust until after the war, whereupon he renounced the gift. The court held that the renunciation could defeat seizure.¹⁹ There the enemy had the power to make the property his own. But the court refused to allow the custodian to treat this power as equivalent to ownership for purposes of seizure, where renunciation would give the property to a friendly person. Here, Yotaro may have had the power to create title in another. But as to him, appellant's title was supreme. The court should not do a United States citizen out of his property by allowing the custodian to treat Yotaro's power unexercisable during the war, as a sufficient basis for seizure of the property.

The next question as to the effect of the Hawaiian recording act on the gift transaction here is whether the custodian is a "third party" within the meaning of the statute, even though this court were to hold that the custodian is not bound to assert only the rights of the enemy whose property he purported to seize. It has been held under the Hawaiian statute that the marshal, as attaching officer, is a mere stranger and not a "third party" so as to be protected against unrecorded chattel mortgages. Thus, in *Wright v. Brown*²⁰ a mortgagee under an unrecorded

¹⁹*Stoehr v. Miller*, 296 Fed. 414 (1923).

²⁰11 Haw. 401 (1898).

chattel mortgage was allowed to replevy the mortgaged property from the marshal, who had attached the property at the instance of a creditor of the mortgagor. The court said that plaintiff's title was not void and that the statute, being designed to protect persons who had "rights" or "interests" in the property, did not protect a "mere stranger" such as the marshal.

On the other hand, in *Holmes v. Serrao*²¹ it was held that the conveyance of land by an agent acting under an unrecorded power of attorney did not bind a person who purchased the land on execution sale, even though the purchaser had actual knowledge of the outstanding power. The decision rested on the ground that actual knowledge was not equivalent to recording. We have no argument against this holding. The problem here is whether the *Holmes* or the *Wright* case more closely resembles the case at bar. The plaintiff in the *Holmes* case had paid value for the land. There was no question that the recognition of the prior unrecorded deed executed by an agent acting under an unrecorded power would be to his "detriment". But the marshal in the *Wright* case had paid nothing for his interest as the attaching officer. Enforcement of the mortgage, said the court, would not be to his detriment. The attachment was made according to law, and gave the marshal such interest as the mortgagor had, but for the unrecorded mortgage. If the mortgage were ineffective he could certainly maintain his title against the mortgagee, just

²¹18 Haw. 25 (1906).

as here, if the gift is deemed invalid, the custodian may maintain his title against appellant. But the Supreme Court of Hawaii has held that one in such a position has not been injured by the unrecorded transaction, and is not a "third party" within the meaning of the statute. The custodian's position is far more analogous to an attaching officer than it is to a purchaser for value. The analogy is not new. In *Kohn v. Kohn*²² Judge Learned Hand drew an analogy between garnishment and attachment on the one hand, and alien property custodianship on the other. The Alien Property Custodian, having put up no value, will suffer no detriment by being forced to recognize the unrecorded authority of Tsuda and Tsutsumi to make the conveyance here in question to Kaname.

We express no opinion whether the recording of the deed to Kaname would cure the invalidity of an unrecorded power. The failure to place the transaction on public record, upon which the decision in the *Holmes* case was based, was not here present.

C. Yotaro Fujino did not exercise such control over the property as to render the conveyance to appellant a sham.

In the remainder of this brief we assume that appellant had legal title, either because the recorded power of attorney contained authority for the agents to make the conveyance, or because the custodian has no standing to claim the protection of the recording act.

²²264 Fed. 253 (1920).

The District Court held that the land was “property ‘owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy’ (Yotaro Fujino) not holding a license within the meaning of Section 7(c) of the Act” (R. 59) and that it was “ ‘owned or controlled by, payable or deliverable to, held on behalf of or on account of or owing to or which is evidence of ownership or control * * * by an enemy country or national thereof’ (Yotaro Fujino—Japan) within the meaning of Section 5(b) of the Act and Executive Orders Nos. 8389 and 9095, as amended.”

There is no evidence that the gift to appellant was subject to an understanding that the property would at any time be returned to Yotaro. Nor is there anything in the nature of a gift transaction which requires it to be regarded as a colorable transaction.²³ That the transfer was made in contemplation of war does not place a higher duty on appellant to show that it was nevertheless bona fide and irrevocable.²⁴ Indeed, even the fact that the transaction gave rise to considerable suspicion of fraud is no basis for challenging uncontradicted testimony.²⁵ In *Miller v. Herzfeld*²⁶ the only evidence of a gift was the radiogram “Transfer Account Felix,” referring to the alien’s brokerage account, and the alien’s testimony after the

²³*Corn Exchange Bank v. Miller*, 15 F. (2d) 456 (1926); *Miller v. Herzfeld*, 4 F. (2d) 355 (1925).

²⁴*Standard Oil Co. of N. J. v. Markham*, 64 F. Supp. 656 (1945).

²⁵*Becker v. Miller*, 7 F. (2d) 293 (1925); *Miller v. Herzfeld*, *supra*.

²⁶*Ibid*.

war that he intended to make a gift of the account to his brother, Felix. The radiogram was sent in the period between termination of diplomatic relations and the declaration of war. Nevertheless the court held that there was a completed gift and the donee could recover.

The District Court indicates that one reason why the land was subject to seizure was because appellant knew nothing of its value and did not exercise complete dominion over it (R. 58). The *Herzfeld* case is significant on this point because there the friendly donee knew nothing about the gift, did not accept it, and reported the property to the Alien Property Custodian as enemy property. Nonetheless, when the war was over and he learned that a gift was intended, he was allowed to sue for the return of the property, and Section 7(c) of the act was not found to stand in his way.²⁷

It is clear then that neither the nature of the transaction as a gift nor the circumstances of its execution, nor the unfamiliarity of appellant with the land, will render the transaction colorable and the seizure valid as far as Section 7(c) of the Trading With The Enemy Act is concerned. The cases under that section, arising out of the first World War, required either that the transaction be incomplete or that the enemy and the friend have agreed that the latter would hold the property for the benefit of the former,

²⁷Cf. *Stoehr v. Miller*, 296 Fed. 414 (1923).

before a court would hold that the property was "belonging to or held for" an enemy.²⁸

In 1941, the Trading With The Enemy Act was amended to include the new Section 5(b).²⁹ The chief change wrought by this section was to allow the seizure of property owned or controlled by foreign nationals, as distinct from enemies.³⁰ Acting under this section the President, by Executive Order,³¹ authorized the Alien Property Custodian to vest—

Any other property or interest within the United States of any nature whatsoever owned or controlled by * * * a designated enemy country or national thereof.³²

Section 10 (a) of the order states that the term "national" shall have the meaning prescribed in Section 5 of Executive Order No. 8389, as amended.³³ "National" is there defined to include—

any person to the extent that such person is, or has been * * * acting or purporting to act directly or indirectly for the benefit or on behalf of any national of such foreign country.³⁴

A comparison of the property subject to seizure under Section 2 (c) of Executive Order No. 9095 and

²⁸Cf. *Corn Exchange Bank v. Miller*, supra, and *Miller v. Herzfeld*, supra, with *Lust v. Miller*, 4 F. (2d) 293 (1923), and *Ebert v. Miller*, 4 F. (2d) 296 (1925).

²⁹50 U.S.C. App. 5(b).

³⁰See *Clark v. Uebersee Finanz-Korporation*, 332 U. S. 480 (1947).

³¹Executive Order No. 9095, as amended by Executive Order No. 9567, 10 F.R. 6917, 50 U.S.C. App. Sec. 6, note.

³²*Ibid.*, Sec. 2(c).

³³5 F.R. 1400; last amendment, Executive Order No. 8998, 6 F.R. 6787, 12 U.S.C. 95(a), note.

³⁴Section 5, E(iii).

that for which seizure is authorized by Section 7 (c) of the Trading With The Enemy Act reveals that the executive order adds one new characteristic not contained in Section 7 (c); that is the matter of "control" by a national of a designated enemy country, as distinct from being held for, on account of, or for the benefit of, an enemy.

We have illustrated how Section 7 (c) was applied to cases similar to the present one arising after the first World War. It is clear that there is nothing in the facts here which justifies a finding that the land in question was held by appellant for the benefit of his father.

Was the land controlled by Yotaro? This seems to be the foundation of the District Court's conclusion. Thus he says:

By controlling the plaintiff as a son and an only son, and controlling him directly as to his use of his shares of stock, Yotaro Fujino indirectly but effectively, silently controlled plaintiff's use and disposition of the land * * * Yotaro Fujino in point of fact controlled the plaintiff, thereby retaining the control, beneficial use, and enjoyment of the land in question. (R. 58.)

Here then, is the crux of the case. If Yotaro so controlled this land as to make the transfer to his son colorable, then perhaps the District Court was right in holding that appellant had no "interest, right or title" in the property. As the weight of the evidence of this control is discussed, it should be borne in mind that appellant is a United States citizen, that the land in question is located in American territory,

that Yotaro was at all times in Japan, and that there is no evidence of any agreement between father and son that the latter would use the land or its fruits only as directed by Yotaro. The situation then is this:

Appellant is given land, a large part of which is occupied by a business of which members of his family are stockholders. Let us even assume that the Alien Property Custodian was right in holding that the business was owned or controlled by Yotaro. The fact that space is necessary to the doing of business and that appellant owned the space occupied by this business, does not support an inference that in owning the land he was controlled by the owner of the business. The relationship of landlord and tenant is too well understood in our law to deduce that a landlord is controlled by his tenant because the tenant needs his land. Nor is it significant as showing Yotaro's control, that appellant did not drive a hard bargain in obtaining rent from the corporation for the land. As a matter of common sense, it would be most unusual and unnatural to find the recipient of a gift of \$300 a month immediately using the power flowing from the gift to force the donor to increase the muniments thereof, particularly where donor and donee are father and son. Nor is it strange or indicative of retained control that Kaname, a schoolboy, should allow his trusted family friends (officers of the corporation) to suggest a reasonable rental for the premises. The fact remains that he was paid rent and that the rental proceeds were given him without any strings attached.

The District Court treats the transaction as a family arrangement and uses the analogy of cases holding that the income of a trust will be taxed to the settlor where he has given it away but retained such control over it as to in effect amount to a certain degree of ownership.³⁵ Of course, under no conceivable extension of the *Clifford* doctrine would the income from this land be taxable to Yotaro. And the tax cases rest entirely on the acknowledged and formalized reservation of degrees of control by the settlor. Here we have neither open nor hidden agreements granting Yotaro the power to control the disposition of the land. Thus, according to the District Court, the power to destroy by confiscation is to be used more readily and with less safeguards than the power to tax. It has never been doubted that the beneficiary of a *Clifford* trust is the legal owner of the income even though the settlor is taxed.

The court found that Kaname used the income from the land to take care of Yotaro's family obligations. This refers to the small gifts of money which appellant made to his adult sisters, to the wedding gift which he gave to a family friend, knowing that his father wanted a gift made, and to the United States tax liability of Yotaro which Oahu Junk Company and appellant paid. Let us consider a hypothetical case:

Suppose Yotaro had given this land outright to appellant in 1941 and after the gift was complete,

³⁵*Helvering v. Clifford*, 309 U. S. 331 (1940); *Losh v. Comm'r*, 145 F. (2d) 456 (1944); *Comm'r v. Buck*, 120 F. (2d) 775 (1941).

had said, "Kaname, I shall be in Japan and I'd like to know that everything is going all right with the family. If you see your sisters in need, you'll give them some money, won't you?" And Kaname said he would. If, thereafter, Kaname gave small amounts to his married sisters would that fact be proof that the subject of the gift to Kaname was so controlled by Yotaro as to be in effect an enemy asset? Kaname's sisters are also American citizens. The property is not being put to enemy use. We submit that such an inference is preposterous. And here, Yotaro did not even use such precatory language at the time he made the gift; much less did he demand that appellant agree to devote the proceeds of the land to Yotaro's purposes as a condition of the gift.

Even less does the wedding gift to an employee of Oahu Junk Company indicate that Yotaro controlled the proceeds of the land. In September 1941, Yotaro cabled the company to make a gift of \$500 to an employee of the company—a family friend and brother of one of the corporation's managers. The corporation was not in a posititon to give this generous wedding gift because of Treasury freeze regulations. Appellant being financially able to make the gift, did so in order to carry out his father's desire and meet his family's social obligation. There is not one scintilla of evidence that appellant was forced to make this gift or that Yotaro had the desire or ability to force him to do so. That two wills happen to coincide in desiring a particular objective does not support an inference that one is subservient to the other.

Moreover, the question being investigated now is not the extent of control exercised over Kaname by Yotaro (which seems to underlie the lower court's decision) but the control retained by Yotaro over the asset itself—the land seized by the custodian. That this is a very real distinction in the administration of this statute will appear hereafter. For the present it suffices to point out to the court that the evidence clearly shows that appellant and he alone, exercised dominion over the bank account wherein the rent from the land was deposited, and that it was appellant—not his father or his father's agent—who distributed the money to his sisters and the wedding gift to the family friend.

The one final element of control suggested by the lower court was the payment of Yotaro's tax liability by Kaname in conjunction with the Oahu Junk Company, Limited. Let us say first that we fail to understand how the payment of an enemy's tax liability, to avoid the penalties and forfeitures to which delinquent taxpayers are subject, can in any way render the source of the funds an enemy asset. The payment was made during the war. The land was situated in Hawaii, far removed from enemy influence and control, and incapable of being used in furtherance of the Japanese war effort.³⁶

Appellant owed his father \$20,000 for the purchase of the stock. Yotaro had an existing tax liability of \$11,000, which his agents desired to pay. The funds of the Oahu Junk Company, Limited, were frozen.

³⁶See *Corn Exchange Bank v. Miller*, 15 F. (2d) 456.

Tsuda and Tsutsumi therefore suggested to Kaname that he borrow \$8,000 from the Oahu Junk Company, Limited, securing the loan by the rental payments of \$300 per month due him from the company, which payments would be set off against the \$8,000 liability. This transaction was arranged primarily to satisfy Foreign Funds Control, who would not otherwise release the funds of Oahu Junk Company, Limited, which were already frozen. But Kaname did not merely donate this \$8,000 to his father. The \$8,000 was credited against his \$20,000 obligation to Yotaro, reducing it to \$12,000 and increasing his equity in the shares pledged. Now it is true that the custodian has vested these shares as being controlled by Yotaro because Yotaro admittedly took notes from the distributees. The issue of whether the custodian could retain the equity of appellant and his sisters, American citizens, over and above the acknowledged enemy interest in the shares, has never been tried. But if appellant has a recoverable interest in the shares, it was substantially increased by the \$8,000 reduction of his liability. In other words, this was a transaction in which appellant received value for his advance.

We submit that the control "by a designated enemy country or national thereof" required by Executive Order No. 9095,³⁷ before the custodian has authority to vest the asset means actual dominion by the enemy national involved so that he would or might be able to make use of the asset against the interests of the United States. If the enemy national concerned is

³⁷Section 2(c), 10 F.R. 6917; 50 U.S.C. App. Sec. 6, note.

Yotaro Fujino (R. 59) there is no evidence of any exercise of dominion over the land or the rentals from it. Appellant had complete control over the fruits of this land. He established the bank account. When money was withdrawn he withdrew it. Control of the asset rested with him. It is merely confusing the issue and making a clear analysis difficult to hold that Yotaro controlled the land so as to make it subject to seizure.

There is no evidence that appellant was holding the land for Yotaro, so that the latter could or would get it back later or that he agreed to use the land for the benefit of his father. Incidental benefits of a social nature will not support an inference that appellant was committed to a course of devoting the land and its proceeds to the benefit of his father. Thus, seizure cannot be justified under Section 7 (c) of the Trading With The Enemy Act. And as we have shown above, there is no evidence that Yotaro controlled the land so as to make it subject to seizure under Section 5 (b) of the act and Section 2 (c) of Executive Order No. 9095. The chief justification relied upon by the custodian in his vesting order³⁸ is that appellant himself was acting for the benefit of or in behalf of Yotaro and was therefore a national of a designated enemy country within the meaning of Section 10 of Executive Order No. 9095, as amended. Therefore property owned or controlled by him could be seized under the authority of Section 5 (b) of the act and executive orders issued thereunder. In other words, the issue now under discussion comes to this:

³⁸Vesting Order Number 2724, finding 2 (R. 13 and pp. 15-16).

Assuming a valid and non-colorable transfer of the land to appellant who became the owner and person in control of the property, was appellant properly determined to be a "national of a designated enemy country" so as to render his property subject to seizure? Did he act in behalf of or under the control of his father, Yotaro Fujino?

II. APPELLANT IS NOT A "NATIONAL OF A DESIGNATED ENEMY COUNTRY".

In determining that appellant was a national of Japan so as to vest title to this land, the custodian found that he was "acting or purporting to act directly or indirectly for the benefit or on behalf of" Yotaro,³⁹ and that the national interest required that he be treated as a national of Japan.⁴⁰ The lower court sustained these findings, saying that Kaname was "a national of a foreign country within the meaning of Section 5 (b) of the act and Executive Orders Nos. 8389 and 9095, both as amended, in that he acted in behalf of or under the control of" Yotaro. (R. 59.) And the court found control in that if appellant acted contrary to his father's wishes, he might "incur his father's displeasure and be read out of the family and out of the corporation". (R. 58.) Here then is the situation as the trial court would have it: A dutiful son, the recipient of a generous gift from his

³⁹Section 5, E(iii), Executive Order No. 8389, 5 F.R. 1400, as amended; 12 U.S.C. Sec. 95(a), note.

⁴⁰Section 10(a) (iii), Executive Order No. 9095, as amended, 10 F.R. 6917; 50 U.S.C. App. Sec. 6, note.

father, who gives certain income from the subject of the gift to members of his family and to his friends, finds himself dubbed and treated as an enemy when war is declared between his father's homeland and his own. Such an illogical conclusion leading to harsh administration should be avoided if the purposes of the Trading With The Enemy Act can nevertheless be attained. The policy of the act is—

that in time of war the Government shall have the right to seize and sequester all property openly or secretly held in this country for the account of one who owes allegiance to and dwells within the territory of this country's enemies * * *. It is a policy designed to cripple the enemy's commerce, to capture his property and to decrease his capacity for prolonging hostilities through the use of private resources.⁴¹

Regarded in the light of the policy as thus articulated, parental control of the type stated by the District Court could not hinder the aims of the act. Nor could the uses to which appellant put his property, which might have conferred a sentimental benefit on Yotaro, be such as could increase the enemy's capacity to wage war. Assuming that war did not sever the ties of filial love, what control could be exercised over appellant by threats of being written out of the family when that had already occurred by his expatriation. In peacetime, appellant gave gifts to sisters and to a friend, which presumably made Yotaro happy. Such peaceful activities certainly had no bearing on Japan's capacity to wage war. When the world was at

⁴¹*Standard Oil Co. of N. J. v. Markham*, 64 F. Supp. 656, 665 (1945).

peace, the normal expectation of everyone would be that a son should carry out his father's desires so long as they are not inconsistent with his own welfare. And every son is subject to the same sort of control by parental disapproval and inheritance in varying degrees.

Must every loyal United States citizen son of an alien father be damned as an alien national during war merely because he recognized, in peacetime, familial ties? This act is one of protection of the nation, not a bill of attainder wreaking vengeance upon the blood of our enemies found in our midst. We must look for the control of a citizen by an enemy during the war. If such exists, then it will be in the national interest to treat the controlled citizen as an enemy national. Relationships of principal and agent, master and servant, landlord and tenant, parent and child, existing between friend and enemy before they became such, are too often innocent to be indiscriminately cut with a Herodian sweep of the custodian's power. There is no evidence here of any agreement whereby appellant agreed to hold the property for Yotaro, or to devote it to Yotaro's purposes, or to stand ready to comply with Yotaro's orders in time of war. There are only the parent-son, pledgee-pledgor, tenant-landlord relationships, none of which carried over to an exercise of control over Kaname during the war. Except for ties of blood, these relationships are probably terminated by the war.⁴² The

⁴²Cf. *Mayer v. Garvan*, 270 F. 229, mod. 278 F. 27 (1920)—(partnership terminated).

payment of Yotaro's taxes during the war, for value, without communication with Yotaro, not only rendered *quid pro quo* to Kaname, but increased the capacity of the United States to wage war.

Again we have attempted to show that the few uses to which appellant applied the rents (which are said to inure to Yotaro's benefit and to show his control) do not in fact support an inference that appellant was acting for and on behalf of his father with regard to this land. There is no evidence of retention of control other than the fact that Kaname was Yotaro's son. Whatever control may exist by virtue of that relationship alone was not within the contemplation of the statute nor was it operative during the war.

There is only one other case in the books wherein a court has sustained the custodian's finding that an American citizen is a national of an enemy country so that his property could be seized. That case is *Draeger Shipping Company v. Crowley*.⁴³ That this judgment of treason or near treason and summary punishment should be charily passed against American citizens is indicated by the facts and opinion of that case. Draeger Shipping Company, an American corporation, and Frederick Draeger, an American citizen, made a contract with Shenker and Company, Inc., a New York corporation solely owned by a German holding company, resulting in an internal merger of their corporations. Thereafter, their business was

⁴³55 F. Supp. 906 (1944).

conducted as a joint venture under the management of Mr. Draeger. The evidence was clear, despite attempts at concealment, that Draeger Shipping Company was carrying on the business of Shenker and Company. Naturally, this business was of considerable value and benefit to Shenker and Company its parent corporation. Obviously Draeger had attempted to cloak the fact that his business was that of the German company. The evidence was clear that Draeger received his instructions concerning the management of the business from Berlin. The case was manifestly one for the exercise of powers under Section 5 (b) of the act. And its facts are in no wise comparable to the facts in the case at bar. We submit that the scant facts shown in the instant case of incidental benefit to Yotaro from the income of the land, and the fact that some of Kaname's actions probably pleased his father and were in accordance with the latter's desire, show neither control of Kaname by Yotaro nor an understanding by Kaname that he would be so controlled. And we emphasize again that there is no other evidence of retention of control such as the contract in the *Draeger* case. In the absence of such evidence, the court below was in error in upholding the custodian's finding that appellant was a national of Japan within the meaning of Section 5 (b) of the act and executive orders issued thereunder.

III. EVEN IF APPELLANT WERE HELD TO BE A NATIONAL OF JAPAN UNDER SECTION 5(b) OF THE ACT, HE COULD STILL RECOVER HIS PROPERTY IN THIS ACTION.

For the purposes of this argument, we assume once again that the gift to Kaname was valid and enforceable, and that there is no evidence that the transfer was only colorable. The fact of "control" either of Kaname or of the property would not alter the fact that he had an "interest, right, or title" unless control were such as to render the transfer just a sham transaction. He therefore is entitled to sue for the recovery of the land provided he meets the other requisites of the government's consent to sue, as contained in Section 9 (a) of the act. The only other qualification a claimant must meet is that he not be "an enemy or ally of enemy". Since he is an American citizen appellant satisfies this qualification also, except in so far as the question is affected by the custodian's determination that he is a "national of a designated enemy country" and the trial court's finding in support of that determination.

Assuming this finding to be correct, is appellant therefore barred in this case? The trial court seemed to think so, for it placed the burden on appellant to show not only that he had an interest in the property but also that he did not fall within the various categories of Section 5 (b). The Supreme Court of the United States has recently answered the question authoritatively and its decision is that appellant may nevertheless recover his property now that the war is over, and the enemy can gain no benefit therefrom.

The question is a nice one of construction of a jumbled statute. The Trading With The Enemy Act⁴⁴ was passed in 1917, allowing the Alien Property Custodian to seize property held for "an enemy or ally of enemy." Logically, then, Congress granted persons who had an interest in the property seized, and who were not enemies or allies of an enemy the right to sue to recover their property.⁴⁵ On December 18, 1941, the First War Powers Act was passed, Title III of which amended Section 5 (b) of the former act. The amendment allowed the Alien Property Custodian to seize "any property or interest of any foreign country or national thereof."⁴⁶ But Section 9 (a) regarding the right to sue for recovery was not amended. Therefore it was questionable whether a "national of a foreign country" whose property was seized by the custodian, and rightfully seized, could nevertheless recover his property, since he was not an "enemy or ally of enemy." Two other courts, in addition to the court below, held that Section 5 (b) impliedly amended Section 9 (a) so that a person whose property was seized had to prove not only that he was not an enemy or ally of an enemy but also that the seizure was unauthorized by Section 5 (b) or the executive orders thereunder before he could bring his action under Section 9 (a).⁴⁷ On the other hand, in *Uebersee*

⁴⁴50 U.S.C. App. Sec. 1 et seq.

⁴⁵Section 9(a) ; 50 U.S.C. App. Sec. 9(a).

⁴⁶50 U.S.C. App., Sec. 5(b) (1) (B).

⁴⁷*Silesian American Corp. et al. v. Markham*, 156 F. (2d) 793 (CCA 2d 1946) ; *Draeger Shipping Co. v. Crowley*, 55 F. Supp. 906 (1944).

*Finanz-Korporation v. Markham*⁴⁸, the Court of Appeals for the District of Columbia held that Section 5 (b) authorized seizure of property suspected of enemy taint, but that persons other than enemies or allies of enemies could recover their interests therein. Thus the court allowed a national of a foreign country to recover his property.

Before examining the Supreme Court cases on the subject, we wish to point out that the present case involves not a friendly alien, but a citizen of the United States. Now, with respect to friendly aliens, a business enterprise owned by them within the United States, and property controlled by that enterprise, may be vested by the custodian provided he finds that such vesting is in the national interest.⁴⁹ But in the case of a United States citizen, the custodian must have a very firm grasp on his own bootstraps in order to achieve a seizure such as we have here. First he must determine that the citizen is "purporting to act directly or indirectly for the benefit or on behalf of" a national of a foreign country.⁵⁰ But this determination would not suffice to authorize the seizure of a citizen's land, because the power with regard to a foreign national extends only to business enterprises, not to individuals.⁵¹ So the custodian, in order to classify him as a national of a designated enemy country, all of whose property may be seized,

⁴⁸158 F. (2d) 313 (1946).

⁴⁹Executive Order No. 9095, as amended, Sec. 2(b), 50 U.S.C. App. Sec. 6.

⁵⁰Ibid., Sec. 10(a); see Executive Order No. 8389, as amended, Sec. 5 E(iii); 12 U.S.C. Sec. 95(a).

⁵¹Executive Order No. 9095, supra, Sec. 2(b).

must further determine either that he is controlled by or acting for an enemy, or that the national interest requires him to be treated as an enemy national.⁵² It is clear then that the power to seize the property of a United States citizen stems from the same source as the power to seize the property of a foreign national, and is merely more attenuated. Therefore safeguards established by the Supreme Court with regard to the exercise of the power against friendly aliens would be *a fortiori* applicable to cases involving American citizens.

To resolve the conflict in lower court decisions, the Supreme Court granted certiorari in the *Uebersee* and *Silesian-American* cases.⁵³

In the *Uebersee* case, the shares of stock in an American corporation held by a Swiss corporation (a friendly alien but a "national of a foreign country") were seized by the Alien Property Custodian. The Swiss corporation brought action to recover the shares under Section 9 (a) of the act alleging it was not an enemy or ally of an enemy and that the property was free from enemy taint. The custodian moved to dismiss on the ground that Section 5 (b) authorized the seizure so that the alien could not recover under Section 9 (a).

The Supreme Court recognized that Section 5 (b) must have some restrictive effect on rights under Section 9 (a) as they had theretofore existed. Under

⁵²Ibid., Sec. 10(a).

⁵³*Uebersee Finanz-Korporation v. Clark*, 332 U. S. 480 (1947); *Silesian-American Corp. et al. v. Clark*, 332 U. S. 469 (1947).

Section 9 (a) friendly alien corporations whose stock was owned by an enemy could nevertheless recover their property.⁵⁴ The court held that the purposes of the 1941 amendment to Section 5 of the act would be frustrated were this interpretation to be continued. But, suggests the court, the right to sue contained in Section 9 (a) should not be read out of the law, since Section 7 (c) makes Section 9 (a) the only remedy available, and the denial of that remedy would probably be unconstitutional. To make the act harmonious with its amendments, therefore, the court determined to abandon the interpretation of the *Behn-Meyer* case, and to regard the definitions of "enemy" in Section 2 of the act as illustrative and not exclusive. The court indicated that it would hereafter define "enemy or ally of enemy" to include a neutral corporation, all or part of the stock of which is owned by an enemy.

How does this holding affect the present case? Appellant has proved that he has record title to the land in question and that it is not held for the benefit of his father. There is no evidence that Yotaro would ever get the land back, nor that the transfer was sham or colorable in any respect. But the trial court, finding that appellant is under the parental control of Yotaro, who could read him "out of the family and out of the corporation" (R. 58), holds that appellant is a national of a designated enemy country (Japan) not entitled to sue to recover his property. The Supreme Court has stated that the only persons whose

⁵⁴*Behn, Meyer & Co. v. Miller*, 266 U. S. 457 (1925).

right to sue is proscribed are enemies or allies of enemies as that term is defined in Section 2 of the act. Assuming that the sort of control exercised by Yotaro over Kaname suffices to justify seizure, does it render Kaname an "enemy" within the meaning of Section 2? Section 2 (c), the only definition applicable, states that the term "enemy" includes—

Such other individuals * * * as may be natives, citizens or subjects of any nation with which the United States is at war, *other than citizens of the United States* * * * as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "enemy".⁵⁵ (Emphasis supplied.)

Unless the express prohibition against declaring American citizens to be enemies be read out of the act, appellant has every right to sue to recover his land. The approach of the Supreme Court in the *Uebersee* case demonstrates the grave antipathy of the court against reading out of the statute provisions which afford protection required by the Constitution. If then the gift to Kaname was a valid transfer (not merely sham or colorable) he has an interest in the property recoverable in this action, since he is not an enemy or ally of an enemy within the meaning of Section 9 (a). If Yotaro had complete control over the property (and the evidence does not show such control) then the transfer was probably colorable and Kaname would have no interest therein which he could claim. But if the control over the property is

⁵⁵50 U.S.C. App. Sec. 2(c).

anything less than complete dominion, then Kaname has an interest therein. And his interest would remain, even though he were subject to certain parental influences which indirectly affected his use of the property. Therefore, even though the seizure of the property were valid because of this limited control (which we deny) the sequestration of the property by the custodian has achieved the objectives for which the power was given him, and any further retention of the property against the legitimate demand of an American citizen is unlawful.

IV. A CONSTRUCTION OF THE TRADING WITH THE ENEMY ACT WHICH WOULD DENY APPELLANT THE RIGHT TO RECOVER HIS INTEREST IN THE PROPERTY IS UNCONSTITUTIONAL.

If appellant has an interest in this property, can he be precluded from suing for its recovery because, by virtue of parental control which his enemy father had over him, he has been denominated an enemy by the Alien Property Custodian? To so decide, the court would have to do considerable violence to the statute. And if the court so decides, it is our contention that the statute as construed would deprive appellant of his property without due process of law in violation of the Fifth Amendment.

Section 7(c) of the act establishes the remedy contained in Section 9(a) as the sole means of recovery of property seized under the act.⁵⁶ To deny appellant,

⁵⁶*Becker Co. v. Cummings*, 296 U. S. 74 (1935).

a United States citizen, this sole remedy is an unconstitutional confiscation. Justification might be found in the war power⁵⁷ whereby the United States may confiscate enemy property. Under this power the seizure of the property of friendly aliens is justified.⁵⁸ But the problem of remedy or compensation remains.⁵⁹ Granting that the seizure of property suspected of being of assistance to the enemy is proper, when that property belongs to an American citizen, the sequestration cannot amount to actual confiscation without remedy.⁶⁰ Nor can the *ex parte* determination by the custodian that the citizen of the United States is in effect a national of an enemy country convert him into an enemy whose property is subject to confiscation. If Yotaro controlled Kaname to such an extent that Kaname's behavior was disloyal to and a crime against the United States, then Kaname would be an enemy. Then his conduct would be giving aid and comfort to the enemies of the United States and he would be guilty of treason. But Kaname can be tried, convicted and punished for that offense only in an orderly way, with the government bearing a heavy burden of proof. And after conviction, his property can be taken only after imposition of sentence in accordance with criminal processes. If appellant is compelled to

⁵⁷Art. I, Sec. 8, cl. 11, United States Constitution.

⁵⁸*Silesian-American Corp. v. Clark*, 332 U. S. 469 (1947).

⁵⁹See *Uebersee Finanz-Korporation v. Markham*, 158 F. (2d) 313 (1946), *aff'd* 332 U. S. 480 (1947).

⁶⁰See Stone, J. in *Becker Co. v. Cummings*, 296 U. S. 74, 79. "The seizure and detention which the statute commands and the denial of any remedy except that afforded by Section 9(a) would be doubtful constitutionality if the remedy given were inadequate to secure to the non-enemy owner either the return of his property or compensation for it."

meet the burden of proving that he is not an enemy of the United States in this sense before he can regain his property, it is clear that he will have been deprived of his property without due process of law.

CONCLUSION.

Appellant Kaname Fujino has an interest in the land in question and, not being an enemy nor an ally of an enemy, but a loyal American citizen, he can as a matter of right sue to recover that interest. The court below was in error in finding that the transfer to him was void as against the custodian or colorable. The court also erred in holding that Yotaro Fujino controlled either appellant or the land within the meaning of the Trading With The Enemy Act as amended. The judgment of the court below should be reversed and the case remanded with directions to restore the property and accumulated proceeds to appellant herein.

Dated, Honolulu, Hawaii,
April 15, 1948.

Respectfully submitted,
J. GARNER ANTHONY,
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ROBERTSON, CASTLE & ANTHONY,
Of Counsel.

(Appendix Follows.)

Appendix.

Appendix

CONSTITUTION OF THE UNITED STATES

AMENDMENTS

Article V

No person shall be * * * deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use, without just compensation.

Statutory Provisions

Trading With The Enemy Act, c. 106, 40 Stat. 411,
as amended (50 U.S.C. App. 1-31) :

The word “enemy”, as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—

* * * * *

(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term “enemy”.

The words, “ally of enemy”, as used herein, shall be deemed to mean—

* * * * *

(c) Such other individuals, or body, or class of individuals, as may be natives, citizens, or subjects of any nation which is an ally of a nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "ally of enemy".

Sec. 5 (as amended by the First War Powers Act of 1941, c. 593, Sec. 301, 55 Stat. 839, 50 U. S. C. App., Supp. V, 5(b)):

(b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or ear-marking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in

which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * * and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

* * * * *

Sec. 7 (as amended by the Deficiency Appropriation Act of Nov. 4, 1918, c. 201, Sec. 1, 40 Stat. 1020) :

* * * * *

(c) If the President shall so require any money or other property * * * owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy * * * which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over

to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

* * * * *

Sec. 9 (as amended) :

(a) That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled:

Provided, That no such order by the President shall bar any person from the prosecution of any suit at

law or in equity against the claimant to establish any right, title or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be en-

tered against the claimant or suit otherwise terminated.

Executive Order No. 9095 (as amended):

* * * * *

2. The Alien Property Custodian is authorized and empowered to take such action as he deems necessary in the national interest, including, but not limited to, the power to direct, manage, supervise, control or vest, with respect to:

* * * * *

(c) any other property within the United States owned or controlled by a designated enemy country or national thereof, not including in such other property, however, cash bullion, moneys, currencies, deposits, credits, credit instruments, foreign exchange and securities except to the extent that the Alien Property Custodian determines that such cash, bullion, moneys, currencies, deposits, credits, credit instruments, foreign exchange and securities are necessary for the maintenance or safeguarding of other property belonging to the same designated enemy country or the same national thereof and subject to vesting pursuant to section 2 hereof:

10. For the purpose of this Executive Order:

(a) The term "designated enemy country" shall mean any foreign country against which the United States has declared the existence of a state of war (Germany, Italy Japan, Bulgaria, Hungary and Rumania) and any other country with which the

United States is at war in the future. The term “national” shall have the meaning prescribed in section 5 of Executive Order No. 8389, as amended, *provided, however*, that persons not within designated enemy countries (even though they may be within enemy-occupied countries or areas) shall not be deemed to be nationals of a designated enemy country unless the Alien Property Custodian determines: (i) that such person is controlled by or acting for or on behalf of (including cloaks for) a designated enemy country or a person within such country; or (ii) that such person is a citizen or subject of a designated enemy country and within an enemy-occupied country or area; or (iii) that the national interest of the United States requires that such person be treated as a national of a designated enemy country. For the purpose of this Executive Order any determination by the Alien Property Custodian that any property or interest of any foreign country or national thereof is the property or interest of a designated enemy country or national thereof shall be final and conclusive as to the power of the Alien Property Custodian to exercise any of the power or authority conferred upon me by section 5(b) of the Trading With The Enemy Act, as amended.

Executive Order No. 8389 (as amended):

* * * * *

Section 5.

* * * * *

E. The term “national” shall include,

(i) Any person who has been domiciled in, or a subject, citizen or resident of a foreign country at any time on or since the effective date of this Order,

(ii) Any partnership, association, corporation or other organization, organized under the laws of, or which on or since the effective date of this Order had or has had its principal place of business in such foreign country, or which on or since such effective date was or has been controlled by, or a substantial part of the stock, shares, bonds, debentures, notes, drafts, or other securities or obligations of which, was or has been owned or controlled by, directly or indirectly, such foreign country and/or one or more nationals thereof as herein defined,

(iii) Any person to the extent that such person is, or has been, since such effective date, acting or purporting to act directly or indirectly for the benefit or on behalf of any national of such foreign country, and

(iv) Any other person who there is reasonable cause to believe is a "national" as herein defined.

In any case in which by virtue of the foregoing definition a person is a national of more than one foreign country, such person shall be deemed to be a national of each such foreign country. In any case in which the combined interests of two or more foreign countries designated in this Order and/or nationals thereof are sufficient in the aggregate to constitute, within the meaning of the foregoing control or 25 per centum or more of the stock, shares, bonds, debentures, notes, drafts, or other securities or obligations of a partnership, association, corporation or other

organization, but such control or a substantial part of such stock, shares, bonds, debentures, notes, drafts, or other securities or obligations is not held by any one such foreign country and/or national thereof, such partnership, association, corporation or other organization shall be deemed to be a national of each of such foreign countries. The Secretary of the Treasury shall have full power to determine that any person is or shall be deemed to be a "national" within the meaning of this definition, and the foreign country of which such person is or shall be deemed to be a national. Without limitation of the foregoing, the term "national" shall also include any other person who is determined by the Secretary of the Treasury to be, or to have been, since such effective date, acting or purporting to act directly or indirectly for the benefit or under the direction of a foreign country designated in this Order or national thereof, as herein defined.

Hawaiian recording act (Revised Laws of Hawaii, 1945).

Sec. 12757. Powers of attorney, etc. All indentures of apprenticeship, articles of marriage settlement and powers of attorney for the transfer of real property within the Territory shall be recorded in the bureau of conveyances, in default of which no such instrument shall be binding to the detriment of third parties and conclusive upon their rights and interests.

No. 11,786

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

KANAME FUJINO,

Appellant,

VS.

TOM C. CLARK, Attorney General of
the United States as Successor to
the Alien Property Custodian,

Appellee.

On Appeal from the District Court of the United States
for the Territory of Hawaii.

BRIEF FOR APPELLEE.

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No. 11,786

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

KANAME FUJINO,

Appellant,

VS.

TOM C. CLARK, Attorney General of
the United States as Successor to
the Alien Property Custodian,

Appellee.

**On Appeal from the District Court of the United States
for the Territory of Hawaii.**

BRIEF FOR APPELLEE.

OPINION BELOW.

The opinion of the District Court (R. 49-60) is reported at 71 F. Supp. 1.

JURISDICTION.

The jurisdiction of the United States District Court for the Territory of Hawaii was founded (R. 50) upon Section 9(a) of the Trading With the Enemy Act, 40 Stat. 411, 50 U.S.C. App. 9(a). The judgment of that Court was entered June 5, 1947 (R. 62).

Notice of appeal was filed August 30, 1947 (R. 444). The jurisdiction of this Court is founded upon Section 128 of the Judicial Code, 28 U.S.C. Section 225.

STATEMENT.

This is a suit brought by the appellant under Section 9(a) of the Trading With the Enemy Act, 40 Stat. 411, 50 U.S.C. App. 9(a), to recover six parcels of land situated in the City and County of Honolulu, Territory of Hawaii, which have been vested by the Alien Property Custodian¹ pursuant to the Trading With the Enemy Act and are claimed by the appellant as his property. The United States District Court for the Territory of Hawaii, Honorable J. Frank McLaughlin, judge, gave judgment dismissing the action. The facts, as found by the District Court and as shown in the record, may be summarized as follows:

At the time of bringing this action the appellant was a citizen of the United States and a resident of Honolulu, Territory of Hawaii (Fdg. 2, R. 50). He was born in the Territory of Hawaii on February 23, 1919 (R. 142). His parents were Japanese citizens (Fdg. 6, R. 50); his father had resided in Hawaii

¹For convenience, the term "Alien Property Custodian" will be used throughout this brief to refer, as the context may require, to the Alien Property Custodian (see Executive Order No. 9095, March 11, 1942, 7 F.R. 1971, as amended) or to the Attorney General as Successor to the Alien Property Custodian (see Executive Order No. 9788, October 14, 1946, 11 F.R. 11981). The Attorney General was substituted as a party defendant in the District Court (R. 67).

since about 1906 or 1908 (R. 106). They had three children: the appellant and two daughters, both older than the appellant (R. 181) and both married to employees of their father's business (R. 182). The appellant resided in Hawaii until August, 1934, when, at the age of 15, he went to Japan "at my father's say," remaining there for six years to study at the Waseda Business School in Tokio (R. 144-5). He left Japan on April 26, 1941, returning to Hawaii on May 4, 1941 (R. 146). Before leaving Japan he took steps to abandon his Japanese citizenship (R. 146).

Prior to 1940 the appellant's father, Yotaro Fujino, was engaged in business in the Territory of Hawaii under the names of The Oahu Junk Company and The Oahu Lumber and Hardware Company (R. 71). The facilities of the business were located on four of the six parcels of land here involved, and possibly a fifth as well (R. 72, 122-3, 157). The land and structures thereon were regarded as property of the business (R. 391) and were necessary and indispensable to its conduct and operation (Fdg. 11, R. 53; R. 309). Their present value is in excess of \$29,000 (R. 10, 28).

In the early part of 1935 Yotaro Fujino and his wife left for Japan, where they have remained since, except for one short visit to Hawaii which he made during 1935 (R. 73, 77, 258). On his departure he left the business in charge of two employees, Tsuda and Tsutsumi, who were made manager and assistant manager of his business enterprises and in favor of whom he and his wife executed powers of attorney (R. 77-8, 259-60; Pltf. Exhs. A, B and C, R. 459-67).

Tsuda and Tsutsumi were citizens of both the United States and Japan (R. 256, 365). Tsuda had been employed at The Oahu Junk Company since 1921 (R. 257), Tsutsumi since 1928 (R. 367). After Yotaro Fujino's departure they handled "the general routine of the business . . . daily routine, buying and selling, and things like that, in the ordinary way . . ." (R. 288). On non-routine matters they requested Yotaro Fujino's instructions by letter (R. 286-8). From 1935 until Pearl Harbor Mr. Fujino was in fairly frequent correspondence with Tsuda and Tsutsumi (R. 175-6, 284-8, 375-80, 399).

Between April and July, 1940, Mr. Robert Murakami, an attorney practicing in Hawaii who had since 1930 handled all Yotaro Fujino's legal business (R. 71, 102) was in Japan on a "vacation trip" (R. 82). He testified that he spent six or seven days with Yotaro Fujino (R. 82), who was then about 55 years old (R. 109). Yotaro Fujino discussed with Murakami "what he wanted to do . . . about his property, his business, real property and all other property which he had in the Territory" (R. 83). The "strained relationship between the United States and Japan" entered into these discussions (Fdg. 7, R. 51; R. 117-8). Other considerations discussed, according to Murakami, were "the advantages of the incorporated form of business enterprise as compared to proprietorship," (R. 83), the desirability of making gifts to avoid inheritance tax (R. 83-4), and the fact that under Japanese law Yotaro Fujino's personal property would probably go to collateral heirs in Japan

rather than to his children, should he die intestate (R. 84). Murakami emphasized that "some method of disposition should be devised by him while he was hale and healthy" (R. 84). It was tentatively decided that the business should be incorporated, that substantial stock holdings in the corporation should be placed in the name of Yotaro Fujino's children, and that he should retain control over them by having them give him notes for the value of stock issued to them, secured by pledges of the stock (R. 87-8, 118-9). Murakami testified that Yotaro Fujino also said that his real estate should not be put into the new corporation (R. 88-9). The appellant, who was then 21 and had almost finished his six-year course of the Waseda Business School, did not participate in any of these discussions (R. 114-15), although he was then living with his father (R. 174).

After Murakami's return to Hawaii the proposed incorporation was set in motion pursuant, apparently, to further instructions of Yotaro Fujino (R. 292-4, 374).² On November 27, 1940, the Oahu Junk Com-

²These instructions were said to have been given by a letter in Japanese from Yotaro Fujino to one Yamamoto (an employee of the business who conducted its correspondence in the Japanese language, R. 75-6). The letter was not put in evidence; the only evidence relating to it is the testimony of Tsuda and Tsutsumi that Yamamoto called them to his house and, having before him a letter in Japanese characters, made statements as to Yotaro Fujino's instructions which he purported to be reading or summarizing from the letter (R. 265-8, 292-4, 374, 381-2). Neither Tsuda nor Tsutsumi read the letter or examined it with any care. Tsuda testified that he was able to see the writing while Yamamoto held it (R. 292); at first he identified the handwriting positively as Yotaro Fujino's (R. 266), but later he admitted that he "would not make sure" of this (R. 268).

pany, Ltd. was incorporated with a capital of \$1,000 represented by ten shares (Pltf. Exh. D, R. 468; R. 92). On December 2, 1940, Yotaro Fujino, through his attorneys-in-fact, executed an indenture purporting to transfer "all of his business and assets" exclusive of real property to the new corporation in exchange for 790 shares of its stock (Def. Exh. 4, R. 449). The 790 shares were issued in the names of Yotaro Fujino, his wife, his daughters and the appellant.³ . . . The appellant and his sisters each executed notes in favor of Yotaro Fujino for the par value of the shares, pledging the shares as security for the notes (R. 93-4, 119, 133-4, 271, 412). The appellant's note and pledge were executed by Tsuda and Tsutsumi acting through a power of attorney which the appellant executed for that purpose (R. 178) and which is still unrevoked (R. 255). (Apparently appellant's mother gave a similar note, R. 428-33). This was done to carry out Yotaro Fujino's repeatedly expressed desire to retain "parental control" (R. 271, 295, 383).

In the indenture conveying Yotaro Fujino's assets to the corporation the corporation assumed all of his

³The total holdings in the corporation were (R. 131):

	Original 10 shares	Additional 790 shares	Total
Yotaro Fujino (appellant's father) . .	2	238	240
Chiyono Fujino (appellant's mother) . .	1	118	119
Kaname Fujino (appellant)		200	200
Katsue Fujiaki (appellant's sister) . .	2	117	119
Shizue Maneki (appellant's sister) . .	2	117	119
Tokuichi Tsuda (employee)	1		1
Yasuo Tsutsumi (employee)	1		1
S. Yamamoto (employee)	1		1
	<hr/> 10	<hr/> 790	<hr/> 800

liabilities connected with the business (R. 449). A schedule of those liabilities which was attached to the indenture listed an outstanding indebtedness covering \$20,000 to the Bishop National Bank of Hawaii, most of which was unsecured (R. 454). Nevertheless, Yotaro Fujino on March 13, through his attorneys-in-fact, mortgaged the six parcels of land owned by him to the Bank for \$15,000 as additional security for this indebtedness (Pltf. Exh. G, R. 488; R. 97-8; 125-8).

A few days later, on March 21, 1941, there was executed a deed purporting to convey, subject to the previous mortgage, the six parcels of land (including the buildings thereon) to the appellant as a gift (Pltf. Exh. H, R. 501). The deed was signed by Tsuda and Tsutsumi purporting to act as attorneys for Yotaro Fujino and his wife (R. 507). They based their assumption of authority to execute the deed on a new power of attorney executed February 20, 1941, by Yotaro Fujino and recorded March 17, 1941 (Pltf. Exh. E, R. 479). This power authorized them *inter alia*

To carry on and transact all my business in the Territory of Hawaii; to enter into, perform and carry out, and to rescind, terminate and cancel contracts of all kinds; to buy, take on lease and otherwise acquire, and to hold, sell, mortgage, hypothecate, pledge, lease and otherwise dispose of, and in any and every way and manner deal with real property, leaseholds and other interests in real property, stocks, bonds, goods, wares, merchandise, choses in action and other property and rights of any nature whatsoever in possession or in action; . . .

It contained no express authority to make a gift. On the appellant's return to Hawaii he was shown the deed and told by Tsuda to have it recorded (R. 153-4). He was told of the existence of the mortgage; after recording the deed he returned it to the possession of the mortgagee and, at Tsuda and Tsutsumi's instructions (R. 211), he endorsed the mortgage note (R. 155-6). At the trial he was ignorant of the amount of the mortgage (R. 155).

While the foregoing transactions were being executed, the appellant was living at his father's home in Japan. He did not discuss these proposals with his father; he received his first information of them either in September or October, 1940, or in December, 1940, when he was told by his father to execute a power of attorney in favor of Tsuda and Tsutsumi (R. 149-50, 178-9). He said that he believed the power was executed in order that a note could be given to his father (R. 151). He did not assist his father in any of his business affairs nor did he read any correspondence relating to his father's business in Hawaii (R. 176-7). He was "absolutely ignorant . . . of any details or affairs of the business of The Oahu Junk Company" (R. 177). As he testified, his father "just told me to do my own studying" (R. 176). He planned on his return to Hawaii to embark on another four-year course of study at the University of Hawaii (R. 174, 183). He testified that his father, referring to his interests in Hawaii, had said that "eventually he will . . . give it all to me" but that for the present "since I was going to school, and I did not show my

merits yet, so he told me to study hard and when I come back, after I go to school, help in that store" (R. 180; see also R. 151, 229).

These statements accurately reflect what happened. It is true that in August, 1941, on instructions from Yotaro Fujino, the appellant was elected President of the Company (R. 316-17). The appellant, however, attended the University of Hawaii from September, 1941 until the spring of 1943 (R. 186, 211). He worked at the Junk Company during the summer and in the afternoon after school, waiting on customers and doing "other little tasks" (R. 184-5, 212). During this entire period, however, he "had nothing to do with the management of the business at all" (R. 185). The routine management continued, as before the incorporation, to be handled by Tsuda and Tsutsumi (R. 155, 184-5, 212), and they continued to correspond frequently with Yotaro Fujino concerning the business (R. 375-80). This correspondence was usually conducted through one Yamamoto, another employee of the business who could read and write Japanese (R. 284). Most of the letters were left at Yamamoto's house (R. 334). His widow testified that immediately after the Japanese attack on Pearl Harbor she "was afraid" and burned "everything in Japanese" (R. 399), including at least 30 envelopes presumably containing letters (R. 403). Nevertheless, some letters showing the extent of Yotaro Fujino's continued activity in the business were produced by the appellant at the trial. Thus on June 30, 1941, Mr. Fujino wrote requesting that monthly statements of the corpora-

tion's financial condition be continued (Deft. Exh. 7-A, R. 457). In August, 1941, he wired instructions that the appellant should be elected president of the corporation and this was done (R. 316-17). In July or August, 1941, he wrote discussing the impact of the freezing regulations and suggesting that some sort of barter system might be set up (R. 320). He corresponded a number of times with respect to particular shipments of iron or rubber scrap to Japan. (R. 317; Deft. Exhs. 5-A, 8-A, 9, R. 455-7, 458; Pltf. Exhs. L-1, M-1, O, Q, R. 515-18, 525, 527, 528). Tsuda and Tsutsumi always tried to carry out his instructions carefully and completely (R. 321).⁴

Despite the fact that the land on which the corporation's facilities were located was not conveyed to the corporation but was purportedly given to the appellant, there was no doubt in anyone's mind that the corporation would be able to continue using it (R. 309-10, 344-46). No written lease was thought necessary (R. 188-9). No rental was paid to the appellant for its use until August, 1941. The appellant at no time demanded any rental and testified that he had had no intention of demanding any during the four years that he planned to attend the University of Hawaii (R. 241-2); the suggestion that a rental should be paid was made by Tsuda and Tsutsumi, who set the figure at \$300 a month (R. 185-6, 298-302). Although Tsuda testified that this rental was "somewhat

⁴In the fall of 1941 Yamamoto made a trip to the Orient during which he apparently traveled in China and the Philippines with Yotaro Fujino and transacted business on behalf of the corporation. (R. 74, 316-18, 376-8.)

cheap" (R. 278), there was no bargaining as to its amount, the appellant simply accepting without question the figure suggested by Tsuda and Tsutsumi (R. 185, 189, 204). The first rental payment, covering back rental to the date of the deed (Fdg. 14, R. 54) was made on August 22, 1941 (R. 185). The appellant testified that Tsuda and Tsutsumi then told him to start a checking account (R. 237, 240) which he did (R. 239). This was less than a month after Yotaro Fujino's accounts had been frozen (R. 300-01) pursuant to Executive Order No. 8389, as amended, which was made applicable to nationals of Japan on July 26, 1941. Executive Order No. 8832, 6 F. R. 3715. The Company's accounts were also frozen pursuant to that Order (R. 329). The appellant denied that he had opened his checking account because his father's account was frozen, but he admitted that he had discussed the freezing with Tsuda and Tsutsumi (R. 240, 300-01). Tsuda testified that although prior to August the Company had had sufficient cash to make rental payments, it had not done so because no demand for payment had been made (R. 278, 302). He gave no reason for his decision in August, 1941, to start paying rent despite the fact that appellant still made no demand for payment (see R. 278, 299, 301-2). He denied that the freezing order had anything to do with the decision, or even that it had been discussed (R. 300).

The funds in this bank account, including both the \$300 rental collected by the appellant on the land purportedly given him and certain rentals collected by him on land in which his mother had a life estate

(R. 221-5), were used by the appellant for a variety of purposes. Out of these funds he paid his college expenses (R. 186), gave money to his sisters when they needed it (R. 189, 213), and at his father's instructions made a wedding gift of \$500 to an employee of the Company (R. 190-192, 226-7). This gift would have been made out of funds of the corporation if they had not been frozen (R. 329). He also used the rental from the land purportedly given him by his father to meet his father's tax obligations. When in 1942 an additional tax liability of some \$11,800 was asserted against his father, he met the major portion of it by borrowing \$8000 from the corporation and giving a note for that amount to be repaid out of future rental payments (R. 244-6, 327-8). This was done at Tsuda's suggestion (R. 312).⁵ The appellant further testified as follows (R. 190):

Q. When your father told you he was giving you this land, he also told you that you would have to pay for your schooling?

A. Yes.

Q. Help your sisters?

A. Yes.

Q. Take care of his obligations?

A. Yes.

Q. Take care of your mother's obligations?

A. Yes.

⁵The remainder of the tax liability was met by the corporation, which purported to loan Yotaro Fujino \$3,800 to be repaid out of two bank accounts owned by Yotaro Fujino (R. 277). The accounts were in the name of "Oahu Junk Company" and "Oahu Lumber & Hardware Company" (R. 277) and hence would seem to have been included in the properties transferred to the corporation by the indenture of December 2, 1940.

Q. All these things you said you have done, he told you you would have to do out of the land, is that correct?

A. Yes.

On December 3, 1943, the Alien Property Custodian, acting pursuant to the Trading With the Enemy Act, issued Vesting Order No. 2724 (R. 13). In that Order he described the six parcels of land in suit and found that Yotaro Fujino, a "national of a designated enemy country", was the beneficial owner of the described property. He further found that the appellant was "controlled by, or acting for or on behalf of" Yotaro Fujino and was therefore himself a "national of a designated enemy country" within the meaning of Executive Order No. 9095, as amended. Accordingly, he vested the property.⁶ After filing a notice of claim with the Custodian (Complaint, para. 17, R. 9, 27), the appellant brought this suit.

The District Court, after trial, ordered the complaint dismissed. It held (R. 49-60) that the purported gift, even if genuinely intended, was ineffective because Yotaro Fujino's attorneys who executed the deed were not empowered to make a gift. It further held that Yotaro Fujino retained the control and beneficial use and enjoyment of the land. It further held that the appellant was a national of a designated enemy country (Japan) whose property could validly be vested under the Trading With the Enemy Act.

⁶The Custodian has also vested the entire capital stock of the Oahu Junk Company as the property of nationals of a designated enemy country. Vesting Order No. 1756, 8 F.R. 10834, Vesting Order No. 7939, 12 F.R. 153.

SUMMARY OF ARGUMENT.

The District Court correctly held that as a matter of law the purported deed of gift on which the appellant bases his claim of title was wholly ineffective to transfer any interest in the property because its execution was not within the authority conferred upon the attorneys-in-fact who executed it. In view of the requirements of the Hawaiian recording statute and of the Statute of Frauds, the authority of the attorneys-in-fact must be found, if it can be found at all, within the written and recorded power of attorney of February 20, 1941. That power purports to be a grant of authority to conduct Yotaro Fujino's business affairs; it contains no express authority to execute a gift of property. In view of the unusual character of a grant of authority to execute a gift of the principal's property, the case is one peculiarly calling for application of the rules that formal powers of attorney are to be strictly construed and that where the instrument enumerates in detail the specific powers conferred, any general language which is used is to be construed in the light of those specific powers.

Even if the deed satisfied the formal requirements of Hawaiian law for effectuating a transfer of real property, however, the appellant cannot prevail. The evidence shows beyond question that the purported transfer of title was a formality only, which made no substantial change in the respective property rights of the parties. The findings of the District Court that the land continued to be beneficially owned by the father, that it continued to be controlled by the father,

and that the appellant, in his dealings with the land, acted for and in behalf of his father and was controlled by him are fully supported by the evidence. Those findings establish as a matter of law that the Custodian is entitled to retain the property. The Act, especially as amended in 1941 and as construed by the Supreme Court in *Clark v. Uebersee Finanz-Korporation*, 332 U. S. 480, is broad enough to permit the United States, in the exercise of its belligerent rights, to seize and retain all property which is beneficially owned or controlled by an enemy even if all the formalities had been satisfied and title had been purportedly placed in an innocent holder. Its purpose is to reach all "property interests which had an open or concealed enemy taint". 332 U. S. at 486.

There is no unconstitutionality in such an application of the Act. The concept of "enemy property" which may be seized and confiscated in time of war as an act of national self-protection and defense is not a rigid and inflexible one, and has never been thought to turn on the niceties of common law rules of title. The use of the test of enemy control is amply supported by precedents in the closely related field of prize law and by analogies drawn from other fields of law.

ARGUMENT.**I. THE PURPORTED DEED ON WHICH THE APPELLANT RELIES WAS INEFFECTIVE TO TRANSFER TITLE TO HIM.**

Since the deed of March 21, 1941 was not executed by the purported grantor, Yotaro Fujino,⁷ in person, the question of its effectiveness turns on the authority of Tsuda and Tsutsumi to execute it as his attorneys-in-fact. The Court below held that the power of attorney of February 20, 1941, which is recited in the deed as the sole source of their authority, did not authorize them to make a gift of land. Appellant seeks to escape that holding by contending that their authority was established by other evidence than the power of attorney. He asserts that "it is undisputed" that Yotaro Fujino had since 1935 intended making a gift of the land to appellant, and that the power of attorney of February 20, 1941 was given for that purpose (Appl's Br., pp. 11, 12). He also refers to testimony that in a letter which was not introduced in evidence and had not been read by the witnesses, Yotaro Fujino authorized the transfer of the land as a gift (Appl's Br., p. 17). We make no concession that it was ever Yotaro Fujino's intention to make a present gift of the land or to authorize his attorneys-

⁷Mrs. Fujino was also named as a grantor, presumably to insure that any rights of dower were conveyed. Since she, too, is bound if at all only by the signature of Tsuda and Tsutsumi who purported to act under a power of attorney substantially similar to that given them by Yotaro Fujino, both parties and the court below have discussed the case as if Yotaro Fujino had been the sole grantor.

in-fact to do so. And we maintain that their authority must be found within the four corners of the recorded power of attorney of February 20, 1941, and that if it is not found in that document the deed must be held ineffective.

The law of Hawaii requires that

All . . . powers of attorney for the transfer of real property within the Territory shall be recorded in the bureau of conveyances, in default of which no such instrument shall be binding to the detriment of third parties and conclusive upon their rights and interests. (Rev. L. of Haw., 1945, Ch. 308, Sec. 12757.)

This provision is worded very broadly and has been so interpreted. It extends its protection not merely to bona fide purchasers or lien-holding creditors, as do most recording statutes, but to all "third parties". The Supreme Court of Hawaii has declared that an unrecorded or improperly recorded power of attorney or other instrument which the statute requires to be recorded "must be regarded as a nullity," *Lalakea v. Hilo Sugar Co.*, 15 Hawaii 570, 576, and that "recording was essential to validity," *id.*; *Holmes v. Serrao*, 18 Hawaii 25, 26. While recognizing that the failure to record cannot be availed of by "mere trespassers or strangers" *Holmes v. Serrao, supra*, it has held that a conveyance made pursuant to an unrecorded power of attorney is invalid even against a subsequent transferee who had actual knowledge of the existence of the power and thus could not be deemed to have

been injured by the failure to record it. *Holmes v. Serrao, supra*.⁸

We think the Court below rightly held that the Alien Property Custodian was entitled to the benefits of the recording statute. He is surely a "third party" in the ordinary sense of the word. He is not a trespasser, for he holds the land pursuant to an Act of Congress authorizing him to seize and retain all enemy property. For some purposes at least his position may even be better than that of the "ordinary assignee for value". *Standard Oil Co. v. Clark*, 163 F. (2d) 917, 932 (CCA 2), cert. den. 68 Sup. Ct. 901. He holds vested property, not for the benefit of the enemy former owner, but for the benefit of the United States and the American people as a whole. Vested property is by statute required to be administered "in the interest of and for the benefit of the United States". Trading With the Enemy Act, Section 5(b), 55 Stat. 838, 50 U.S.C. App., Sec. 5(b). In particular, the statute explicitly directs the Custodian to hold the property for the benefit of American creditors and to pay the claims of such creditors according to prin-

⁸The decision in *Wright v. Brown*, 11 Hawaii 401, on which appellant relies heavily (Appl's Br., 21-3), lends him little support. That case did not hold that an unrecorded transfer is good against a marshal on a levy of execution in a creditor's suit. The decision rested rather on the fact that the party seeking to attack an unrecorded chattel mortgage had introduced no evidence to show the basis of his claim to the property. The court said:

It does not appear under what claim or in what capacity the defendant held the chattels. He was and is the Marshal and we understand outside the record that he held the goods on execution against the property of Cross [the mortgagor], but for the purposes of this case he is to be considered a mere stranger or trespasser. (11 Hawaii at 403.)

ciples analogous to those applied in bankruptcy. Trading With the Enemy Act, Sec. 34, 60 Stat. 925, 50 U.S.C. App., Sec. 34. Hence, we think he should be in a position comparable to that of a trustee in bankruptcy, who is almost invariably allowed to disregard unrecorded transfers. Bankruptcy Act, Sec. 70, 11 U.S.C., Sec. 110; Collier, Bankruptcy (14th Ed., 1942), Sec. 70.

Even if we should be wrong as to this, however, the appellant is faced also with the requirements of the Statute of Frauds. As enacted in Hawaii, that statute requires that any contract for the sale of land must be evidenced by a writing "signed by the party to be charged therewith, or by some person thereunto by him *in writing duly authorized*." Rev. Laws of Hawaii, 1945, Ch. 166, Sec. 8721. (Emphasis added.) This provision has been held to prevent any "verbal transfer of real estate without writing" and hence to preclude the establishment of a gift of land by parol. *Mokuai v. Kapuniai*, 6 Hawaii 160. Under this provision the deed of March 21, 1941, is effective as a writing to bind Yotaro Fujino only if the authority of those who signed as purported attorneys-in-fact is found in writing. And under such a provision it is settled that the written authority relied upon must be strictly complied with and that parol evidence of the principal's intention or of his acquiescence in what was done cannot enlarge the terms of the written authority. See e.g., *Kozel v. Dearlove*, 144 Ill. 23, 32 N. E. 542; *Stetson v. Patten*, 2 Maine

358; *Chick v. Bridges*, 56 Ore. 1, 107 Pac. 478; *In re Springer's Estate*, 97 Wash. 546, 166 Pac. 1134.

We turn therefore to the text of power of attorney of February 20, 1940, which was the only written authorization produced at the trial. The character of that instrument (R. 479-82) is shown by its opening phrase which grants the authority "to carry on and transact all my business in the Territory of Hawaii." The subsequent grants of authority all relate to the conduct of ordinary business transactions. Although the instrument enumerates in detail and at length a wide variety of specific powers necessary and appropriate to the conduct of ordinary business affairs, it nowhere purports to confer the authority to make a gift of land or other property. As the Court below said (R. 56), the power of attorney

must be read as a whole, and thus read it is a grant of—as it says—full and adequate power "to carry on and transact all my business in the Territory of Hawaii." A gift is not a business transaction.

It is true that, in the midst of numerous specific grants of authority to conduct business transactions the instrument contains general phrases conferring the powers to "otherwise dispose of" real property and "to remise, release and quitclaim" interests in property. We think the Court below was clearly correct in holding that these were mere "catch-all" phrases (R. 56) to be construed in the light of the specific powers which they accompany and that they

are insufficient to confer by their generality the highly unusual power to make a gift of land.

It must be remembered that we are dealing here with a transfer of land by means of documents to which the law attaches a high degree of formality. The Supreme Court of Hawaii has declared of powers of attorneys generally that

Formal letters of attorney are subject to a strict construction and are never interpreted to authorize acts not obviously within the scope of the particular matter to which they refer. General language when used in connection with a particular subject matter will be presumed to be used in subordination to that matter. *Lopez v. Soy Young*, 9 Hawaii 113, 115. (See also *Hawaiian Agricultural Co. v. Norris*, 12 Hawaii 229.)

These statements are in accordance with the general rule in the United States. See e.g., *Lanahan v. Clark Car Co.*, 11 Fed. (2d) 820 (C.C.A. 3); *Lindenberger Cold Stor. & C. Co. v. J. Lindenberger*, 235 Fed. 542, 570-571 (W. D. Wash.); *In re Springer's Estate*, 97 Wash. 546, 166 Pac. 1134; *Brown v. Laird*, 134 Ore. 150, 291 Pac. 352; Mechem, Agency (2nd Ed., 1914), Sec. 784.⁹ There is a particular reason to apply these rules to an assertion of the power to make a gift of the principal's property. Such a power is so unusual, and so remote from the ordinary functions of an

⁹Here, moreover, the power was drawn by, or for, the attorney-in-fact and submitted to the principal for signature. "If there are ambiguities in the power of attorney, they are to be resolved against the draftsman." *In Re Manufacturing Lumbermen's Underwriters*, 18 F. Supp. 114, 122 (W.D. Mo.).

agent, as to warrant the requirement it can be conferred only by the clearest and most explicit language and that it will not be implied from a general power to sell, mortgage and otherwise dispose of the land. See *Kaaukai v. Anahu*, 30 Hawaii 226, 227. See also *Hathaway v. McGillycuddy*, 56 Cal. App. 689, 206 Pac. 108; *Bertelson v. Bertelson*, 49 Cal. App. (2d) 479, 122 P. (2d) 130; *Brown v. Laird*, 134 Ore. 150, 291 Pac. 352; *Huntsman v. Huntsman*, 56 Utah 609, 192 Pac. 368; Mechem, Agency (2nd Ed.) 1914, Sec. 818; 73 A.L.R. 884 and cases cited. Measured by these standards the power of attorney of February 20, 1941, does not support the appellant's claim. Accordingly, the deed was wholly ineffective to confer any right on the appellant.

II. EVEN IF THE APPELLANT ACQUIRED FORMAL TITLE, THE LAND WAS AT ALL TIMES PROPERTY CONTROLLED AND BENEFICIALLY OWNED BY AN ENEMY NATIONAL WHICH THE CUSTODIAN WAS ENTITLED TO VEST AND RETAIN.

- A. The District Court's findings that the land was controlled and beneficially owned by an enemy national were fully supported by the evidence and should be affirmed.**

Even if the formalities necessary to convey title to land were satisfied, however, the appellant may not recover. He must also establish that the transfer was genuine and resulted in a complete severance of his father's ownership and control of the land. On this issue, as on all issues at the trial, the burden of proof was on the appellant to establish the interest to which he was entitled. Trading with the Enemy Act, Sec. 9(a); *Thorsch v. Miller*, 5 F. (2d) 118

(App. D. C.); *Sturchler v. Hicks*, 17 F. (2d) 321 (E.D.N.Y.). The District Court has found as a fact that

Although record title to the six parcels of land stood in plaintiff's name, he did not have or purport to exercise complete and absolute ownership of the property. Notwithstanding the deed, plaintiff's father, the grantor, has, through his attorneys in fact and personally, retained control and the beneficial ownership of the land. In holding the record title to the land, plaintiff has acted for and in behalf of his father and has been controlled by him. (Fdg. 15, R. 54-5.)

A major part of the appellant's argument is devoted to an attack upon that finding and various subsidiary findings. The attack on the findings seems to disregard the salutary principle, embodied in Rule 52(a) of the Federal Rules of Civil Procedure and consistently adhered to by this Court, that "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial Court to judge of the credibility of the witnesses." See *Hartford Accident & Indemnity Co. v. Jasper*, 144 F. (2d) 266, 267 (C.C.A. 9), and cases cited. This principle is particularly applicable in a case where almost the entire evidence consisted of testimony in open Court and where the crucial issue of continuing control by Yotaro Fujino turned in considerable part on the state of mind of the appellant and of other witnesses. As this Court has said:

Where the witnesses appeared in court in person we are bound to respect the determination [of the trial court] as to questions of fact. (*Neil v. Gross*, 101 F. (2d) 153, 155 (C.C.A. 9.)

We think the findings here, far from being "clearly erroneous", are amply supported by the evidence. True, there is no unequivocal testimony of any witness that the transactions of 1940-1941 were without any real effect on Yotaro Fujino's continued control and enjoyment of his Hawaii properties, including both his business and the land on which it was located. Such an admission could hardly be expected. Parties who in contemplation of war seek to create a false appearance of non-enemy ownership seldom leave a clear trail of direct admission. The only significant witnesses at the trial were the appellant himself, Tsuda and Tsutsumi, his father's attorneys-in-fact and trusted agents, and Murakami, his father's counsel who had arranged the legal formalities of the transfers, all of whom could be presumed to be favorable to the appellant's position in this litigation. Moreover, most of the letters received from Yotaro Fujino during 1940-1941 were destroyed immediately after Pearl Harbor, so that there was a very sparse record of contemporaneous statement to show how the parties then regarded their relationships. Despite the inherent unlikelihood in such circumstances of finding a confession that the purported transfer of ownership was sham, the record is, we submit, more than adequate to support the District Court's finding. It shows beyond question that the dispositions of his Hawaii properties purportedly made by Yotaro Fujino in 1940 and 1941 had no real effect on his continued control and enjoyment of those properties, and that after as well as before those transactions he remained the real owner.

Prior to November 1940, Yotaro Fujino was without dispute the owner of a valuable business and of six parcels of land, the principal importance of which was a site for the business. Since 1935, these properties had been managed for him by Tsuda and Tsutsumi as his attorneys-in-fact, subject to his written instructions. In what way did his position differ after March, 1941?

(1) *Control of the business.*—Nominally the ownership of the business was divided up among members of Yotaro Fujino's family so that a majority of the shares was in the name of the three children resident in Hawaii. Actually, this was a paper transaction only. No money or other consideration was paid by the children. Shares were issued, notes given for the assumed value of the shares, and the shares pledged as security for the notes. The avowed purpose of the pledges was to enable Yotaro Fujino to retain "parental control". There is nothing in the record to suggest that it was ever contemplated that the appellant or his sisters would pay off the notes and redeem the pledges. So far as appears, none of them would have been financially able to do so even had they so desired. The appellant evidently had no property and no source of income at the time of the incorporation.¹⁰ The sisters were married to subordinate employees of

¹⁰While the land was formally to be transferred to him, it was certainly not contemplated that he should sell the land in order to pay off the notes, and there was no suggestion until August, 1941, that he should derive any appreciable income from the land. In any event, an income of \$300 a month out of which he had to pay his college expenses and look after various obligations of his father would hardly permit the appellant to save enough to pay off a \$20,000 indebtedness at any foreseeable future time.

the corporation and it was evidently necessary for the appellant at various times to give them money. Although the appellant was living with his father, both when plans for the incorporation were discussed with Murakami and when the corporation was actually set up, those plans were merely "casually" mentioned to him (R. 149). He was never consulted by his father as to his willingness to assume an obligation in the amount of \$20,000 or as to the fairness of the valuation which his father placed on the shares; his father merely "told me he was make me sign the notes" (R. 230).¹¹ There is likewise nothing to suggest that his sisters were consulted, and, indeed, the testimony is entirely to the effect that the incorporation was car-

¹¹The way in which the appellant was regarded is illustrated by the following excerpt from his testimony on cross examination:

Q. You knew that you had had 200 shares of stock issued to you—or did you know that?

A. Yes, I recall his saying that to me.

Q. You recall that?

A. Yes.

Q. Did you talk much about it with your father?

A. Oh, not to go into the details.

Q. He just said to you: "I have issued 200 shares of stock to you?"

A. Yes.

Q. And I believe you testified the other day he said: "You have not proven yourself yet, so I am going to have you give me a note for twenty thousand dollars for that stock?"

A. Yes.

Q. Is that right?

A. Yes.

Q. Did he say anything more about that stock?

A. No, that is about all.

Q. He just announced that to you; he said, "I have issued 200 shares of stock. You haven't proven yourself, and so you have got to pay me under this note twenty thousand dollars," or you gave him a note for twenty thousand dollars for the stock?

A. Yes; he knew I was going to school; he told me I was to study hard. (R. 177-8).

ried out wholly by Tsuda, Tsutsumi and Murakami, pursuant to instructions from Yotaro Fujino, and that all concerned took it for granted that appropriate notes and pledges would be forthcoming without question.

After the incorporation the conduct of the business remained unchanged. The routine management continued to be in the hands of Tsuda and Tsutsumi as it had been between 1935 and 1940. Yotaro Fujino continued to send "instructions" which Tsuda and Tsutsumi "would try to carry out as carefully and completely as [they] could" (R. 321). On the other hand, appellant, although elected President on his father's instructions, "had nothing to do with the management of the business at all" (R. 185), and disclaimed any pretense of ability to exercise business judgment about the affairs of the Company. For instance at the trial, when asked whether the Company could do business if they did not have the land here in suit, he replied "well, I don't have that much business mind, to be definite" (R. 189). He apparently deferred to Tsuda and Tsutsumi on everything, regarding them as "much more mature than me" (R. 212). He conceived it his duty simply to obey his father's injunction to which he repeatedly referred in his testimony, "to study hard and . . . after I go to school, help in that store" (R. 180; see R. 151, 176, 178, 229). There is nothing in the record to suggest that either of the appellant's sisters exercised any more active voice in the affairs of the corporation.

Thus the purported ownership of the stock by the children meant nothing in terms of the control of the business. Nor did it have any significance in connection with any of the other attributes of ownership. The children could not sell the shares because they were pledged to their father. Apparently no dividends were ever paid on the shares.¹² For all practical purposes the incorporation was a mere paper transaction without any real significance except as an attempt to avoid seizure of the entire interest in the corporation in the event of war between the United States and Japan.

(2) *Control of the land.*—There is no reason to believe that the purported transfer of the land was any more real. The two transactions were necessarily linked together. The land was important only as a site for the business, to which it was indispensable. The two transfers were discussed together in the summer of 1941 and were later carried out as essentially one transaction. Both were motivated by Yotaro Fujino's concern with the "strained relationship between the United States and Japan" (R. 117-118). Moreover, the only motive attributed to Yotaro Fujino in making the transfer is wholly consistent with a retention by him of all the benefits of ownership. Appellant's witness testified that his objectives were to prevent the passage of land to collateral heirs

¹²Although the appellant's witnesses were examined in some detail concerning the appellant's income and his disposition of it, there was no suggestion that he derived any income from dividends on his shares in the corporation. It affirmatively appears that no dividends were paid Yotaro Fujino (R. 206, 275).

on his death and to avoid payment of estate taxes. There is no suggestion that he wished appellant to exercise any present dominion over the land or to enjoy any present benefit from it.

It is unnecessary, however, to rely on assumption, for the actual treatment of the land by the parties shows that the formality of title in the appellant was disregarded. For example, just before the deed to appellant was executed, Tsuda and Tsutsumi, as attorneys-in-fact for Yotaro Fujino, mortgaged the land for \$15,000 (over half of its declared value). The mortgage was to secure an indebtedness which had several months earlier been assumed by the new corporation. Moreover, Tsuda and Tsutsumi purported, at the time of the mortgage, to have been under instructions to transfer the land to the appellant. Apparently, however, Tsuda and Tsutsumi took the realistic view, ignoring the formalities both of the incorporation and the deed of gift which was about to be executed. They mortgaged Yotaro's land which he was about to "give" to his son for an indebtedness which was neither appellant's nor Yotaro's, but the corporation's. The appellant apparently shared the same view, for although he claims to have been informed some months before of his father's intention to give him the entire land, he made no objection and expressed no surprise when he learned of the mortgage.

The dealings with the land after execution of the deed confirm this conclusion. It was assumed by all

that the land would continue to be available to the corporation. No rental was paid until August, 1941, shortly after the freezing controls became applicable to Yotaro Fujino, his wife and the corporation. The suggestion to pay rent came from Tsuda and Tsutsumi and the rental paid by them was accepted without question by the appellant.¹³ When the final payment was made they instructed appellant to start a bank account with the rental payments.^{13a} Although they denied that this action was taken because of the application of the freezing regulations to Japanese property, the inference that it was done for that purpose is unavoidable.

These rental payments were used to pay the appellant's college and general living expenses, which presumably, his father would otherwise have paid. In addition, appellant used these funds to make gifts to his sisters which his father would otherwise have made and, on his father's instructions, to give \$500 to an employee of the corporation—a gift which the corporation would have made but for the freezing regulations. Finally, the appellant helped pay his father's income tax by borrowing \$8000 from the cor-

¹³Although Tsuda testified that the rental was set "sometime right after Kaname got back to the Territory" (R. 277), he gave no satisfactory explanation of the failure to pay rental until August. The inference is legitimate that no discussions as to rental were had until the impact of the freezing controls made such action appear desirable.

^{13a}Since the appellant was an American citizen a bank account in his name would not be likely to be frozen, and the account which he set up was not frozen.

poration to be repaid out of the \$300 rental payments.¹⁴

In all these transactions the appellant appears to have been completely passive, doing whatever Tsuda or Tsutsumi told him to. He left in force the power of attorney which he had given Tsuda and Tsutsumi although he understood that power as giving them the power at any time to deed away the land purportedly conveyed to him (R. 255). He made no protest at the mortgaging of the land, contrary to his father's asserted intention to give it to him outright. At Tsuda and Tsutsumi's instructions he even endorsed the note for the mortgage indebtedness so as to become personally liable for the Company's debt. He made no suggestion that he should be paid rent and did not bargain with respect to the "somewhat cheap rental." He obeyed without question his father's telegraphic instructions to pay \$500 to an employee. He followed Tsuda and Tsutsumi's "suggestion" in meeting his father's income tax liability. He testified that when his father said he was giving him the land he told him he "would have to" take care of his parents' obligations "out of the land." He testified that he corresponded with his father about these various transactions and acted upon his

¹⁴The minutes of the corporation report that this \$8,000 was credited against appellant's note of \$20,000 to his father (Pltf. Exh. P., R. 526). Since the whole issue of the stock for notes and pledges was a mere paper transaction, this further paper credit, if made, was hardly significant. What was significant was that rental payments from that time on were applied to the repayment of appellant's loan so that appellant ceased to obtain any practical benefit from his ownership of the land.

advice and instructions (R. 192). He testified that he was "guided entirely" by what Tsuda and Tsutsumi told him he should do (R. 211). In all this he drew no distinction between the land and the business; thus when asked about the amount and nature of the mortgage on the land purportedly transferred to him he said "well, the details I wouldn't know because Mr. Tsuda and Tsutsumi did the actual running of the business. I only knew there was a mortgage" (R. 155). The entire record reveals him as a young man who, although legally of age, was concerned solely with obeying his father's injunction to "study hard" and who in all of his property transactions deferred completely to his father's wishes or to the "advice" of his father's attorneys-in-fact. Directly, or through his trusted agents, Yotaro Fujino had as complete control over the land and its use as he had had before the purported gift. It is hard to imagine that after the incorporation and the purported gift Yotaro Fujino felt himself the poorer or, if he did, that such a feeling had any rational foundation in fact. Cf. *Helvering v. Clifford*, 309 U. S. 331, 336.

The appellant has argued that the payments which he made out of the rentals received were all made of his own free will because of his independent desire to meet family obligations which his father was unable to meet, and that the mere fact that his wishes conformed with his father's fails to show control (Appl's Br., pp. 29-33). It is true that on direct examination the appellant testified that he made no

agreement to hold the land for his father and that he used the income from it as his own (R. 158). But the weight to be given that testimony was for the trial court to determine. The question whether appellant was a free agent whose wishes happened to coincide with those of his father or a strawman who would automatically comply with any instruction of his father or his father's agents was a question of fact to be determined by the trial Court on the basis not only of the testimony, but also of the observed demeanor of the appellant and the attorneys-in-fact on the witness stand. We have shown that there was ample evidence to support the Court's finding that "the management of the business and the real estate was left entirely to the attorneys-in-fact, and plaintiff with regard to each did what he was advised to do by his father's attorneys-in-fact" (Fdg. 14, R. 54). The appellant's argument is thus simply a request that this Court, on the basis of the cold record only, substitute its judgment as to the weight of the evidence for that of the trial judge who saw and heard the witnesses.

B. On such findings the Custodian is entitled as a matter of law to retain the vested property.

It is clear that in a suit under Section 9(a) of the Trading with the Enemy Act—the location of formal title is not controlling. The Custodian is empowered to seize and retain property which is beneficially owned by an enemy even though formal title may be

in non-enemy hands.¹⁵ Thus in *Stoechr v. Wallace*, 255 U. S. 239, the Court denied relief in a suit under Section 9(a) brought by the holder of record title to the property sued for, because it found that the "beneficial ownership" (255 U. S. at 251) remained in an enemy. The decision of the District Court, 269 Fed. 827, 835 (S.D.N.Y.), which the Supreme Court affirmed, makes it abundantly plain that a holder of bare legal title has no rights against the Custodian. Similarly, in *Standard Oil Co. v. Clark*, 163 F. 2d 917 (C.C.A. 2), cert. den. 68 Sup. Ct. 901, the Court denied recovery to the holder of record title on the ground that formal transfers of title by an enemy to the plaintiff had "made no substantial change in the relative property interests of the parties" (163 F. 2d at 923). See also *Kind v. Clark*, 161 F. 2d 36 (C.C.A. 2), cert. den. 68 Sup. Ct. 108; *Hodgskin v. U. S.*, 279 Fed. 85 (C.C.A. 2).

These well-settled principles require affirmance of the decision below. The District Court's finding that Yotaro Fujino, an enemy, retained the "beneficial ownership" of the land is, as we have shown, amply supported by the evidence. Both the incorporation and the purported land transfer were clearly sham transactions which were often ignored by the parties in their dealings with the property and which were without any practical significance. Even though sham

¹⁵Cf. Section 7(c) of the Act, 40 Stat. 411, 50 U.S.C. App. Sec. 7(c) which authorizes the Custodian to seize not only property "belonging to" an enemy but also property "held . . . on behalf of or for the benefit of" an enemy.

character was not “disclosed by direct evidence or confession”, *Standard Oil Co. (N.J.) v. Clark, supra*, 923, the trial Court was at liberty to disregard the self-serving statements of appellant’s witnesses. The cases cited at pp. 24-5 of appellant’s brief do not require a contrary conclusion. Each of those cases rests on its own facts, and in none, so far as the reports reveal, was there such a showing of day-to-day action inconsistent with the hypothesis of real ownership in the claimant and consistent only with control and beneficial ownership in an enemy as is here present. In any event, the question here is not whether different findings could have been made on the present record, but whether the findings that were made can be set aside as “clearly erroneous.”

The District Court’s further findings that Yotaro Fujino retained “control” of the land and that appellant, in his actions relating to the land, “acted for and in behalf of his father and has been controlled by him” afford additional grounds for affirmance of the decision below. By the First War Powers Act, 1941, 55 Stat. 838, 50 U.S.C. App. Sec. 5(b), Congress amended Section 5(b) of the Trading with the Enemy Act to give “a broader grant of authority to the Executive”, *Markham v. Cabell*, 326 U.S. 404, 411. As amended, Section 5(b) conferred the power to vest “any property or interest of any foreign country or national thereof.” The term “national” had been used in amendments made to the Act by the Joint Resolution of May 7, 1940, 54 Stat. 179. When the First War Powers Act, 1941, was enacted the term

had acquired a well-established meaning. It had been defined by the President (Executive Order No. 8389, April 10, 1940, 5 F. R. 1400, as amended by Executive Order No. 8785, June 14, 1941, 6 F.R. 2897), and that definition had twice been ratified by Congress (Joint Resolution of May 7, 1940, *supra*; First War Powers Act, 1941, *supra*, Sec. 302).

As thus defined a "national" of any country includes any business enterprise "owned or controlled by" one or more nationals of that country and "any person to the extent that such person is, or has been . . . acting or purporting to act directly or indirectly for the benefit or on behalf of" a national of that country (Executive Order No. 8389, as amended, Sec. 5(E)). This definition has been adopted as a criterion for the exercise of the vesting power. By Executive Order No. 9193, July 6, 1942, 7 F.R. 5205, so far as here relevant, the President authorized the Custodian to vest property "owned or controlled by . . . [or] held on behalf of or on account of" a "national" of a "designated enemy country" (Sec. 2(c)). He designated Japan as an enemy country and declared that the term "national" should, with an exception not here relevant¹⁶ have the meaning prescribed in Executive Order No. 8389, as amended (Sec. 10).

¹⁶The exception is that persons not within the designated enemy country are not to be regarded as nationals of such country for purposes of the Order unless at least one of three specified findings is made. Among the requisite findings are a finding either that the person is "controlled by or acting for or on behalf of" a person within the enemy country or that the national interest requires that such person be treated as a national of a designated enemy country. Both findings were made in the Vesting Order in this case. (R. 15-16.)

As a consequence of the 1941 amendments to the Trading with the Enemy Act the Custodian is empowered to vest property which is "controlled" by an enemy or which is owned by a person "acting for the benefit of or on behalf of" an enemy. In both of these categories the ultimate criterion of vestibility is enemy control, whether that control is looked at as being exercised directly on the property or on the person holding the property.

The significance of enemy control in the amended act is clearly established by the decision of the Supreme Court in *Clark v. Uebersee Finanz-Korporation*, 332 U. S. 480. In that case the Court held that a Swiss corporation was not barred from recovering vested property by the mere fact of its incorporation in Switzerland in the absence of any allegation that it was subject to enemy influence or taint. In so holding, however, the Court pointed out that the 1941 amendments had sought to cure the "rigidity and inflexibility" of the 1917 Act (p. 484). It said (pp. 484-5) that "it was notorious that Germany and her allies had developed numerous techniques for concealing enemy ownership *or control* of property which was ostensibly friendly or neutral. They had through *numerous devices, including the corporation*, acquired *indirect control or ownership* in industries in this country for the purposes of economic warfare. Sec. 5(b) was amended on the heels of the declaration of war to cope with that problem." (Emphasis added.) Accordingly, it declared that the amendment was designed "to reach enemy interests which masqueraded

under . . . innocent fronts" (p. 485) and to give the President "‘flexible powers’ . . . to deal effectively with property interests which had an open or concealed enemy taint" (pp. 485-6).

To illustrate the significance of the changes made by the 1941 amendments, the Court referred to the case of property in the United States owned by a foreign corporation which in turn was enemy owned. In *Behn, Meyer & Co. v. Miller*, 266 U.S. 457, a case growing out of World War I, the Court, adhering strictly to corporate formalities, had held that such property was not enemy-owned and must be returned. In the *Uebersee* case the Court declared that the *Behn, Meyer* decision was inapplicable under the amended Act, saying that to apply it would "run counter to the policy of the Act and be disruptive of its purpose" (p. 488). Accordingly, the Court declared, the definition of enemy contained in Section 2 of the Act must be "harmonized with the policy underlying § 5(b) and § 9(a) of the amended Act." (p. 488).

The present case presents a question analogous to that involved in the *Behn, Meyer* case. Here, as there, property in the United States, although nominally held by an innocent holder, has been found to be controlled in fact by an enemy resident in enemy territory. The question is whether the United States can vest and retain it as enemy property by virtue of that control or whether it is immunized from seizure by the fact that formal title has been placed in an American citizen. In view of the 1941 amendments and the

Uebersee decision, we think there can be no question of the right of the United States to the property. The application of the Act can be "harmonized with the policy underlying § 5(b) and § 9(a) of the amended Act"—i.e., the policy of reaching all "enemy interests which masqueraded under . . . innocent fronts"—only by holding that all property which as a matter of economic reality is enemy controlled may be vested and retained.

There can be no doubt that enemy "control" in the sense used by the Court in the *Uebersee* case existed here. Yotaro Fujino is an enemy in the strictest sense of the word. His control of the land rested both on his legal powers and on the practical actions and understandings of the parties. In the unlikely event that conflict had arisen between Yotaro Fujino and the appellant as to the use of the land, Yotaro Fujino had ample means of compelling obedience. The appellant's hope eventually to step into his father's shoes in the business—a hope to which, the testimony shows unequivocally, he attached far more importance than to any rights to the land—could have been destroyed if he had incurred his father's displeasure. Indeed, his father could at any time have demanded payment of the note for \$20,000, and could thereupon have retaken the stock which had been issued in the appellant's name since that stock was held as security for the "loan". The appellant's title to the land, if he had any, was also dependent on the good will of his father and his father's agents. The appellant was plainly in no position to pay off within one year, according to

its terms, the \$15,000 note which he had endorsed and as security for which the land had been mortgaged. If his father's agents, as managers of the corporation which his father controlled, had failed to pay off the note the mortgage would have been foreclosed and the land sold.

Of course, none of the foregoing steps was taken or anticipated. They were unnecessary. It would not have occurred to the appellant to do anything contrary to his father's wishes. He was content to leave the use of the land with the corporation, to accept as his principal source of income whatever payments his father's agents decided to make him, to remain dependent on those payments and certain other income owned by his mother for his current revenue, to obey implicitly his father's instructions as to the disposition of the money he received, and to defer in everything to the decision of his father's agents. In other contexts the Courts have recognized that "under some circumstances 'controlling influence may spring as readily from advice constantly sought as from command arbitrarily imposed.'" *American Gas & Electric Co. v. Securities and Exchange Commission*, 134 F. (2d) 633, 642 (App. D.C.), cert. den., 319 U.S. 763. For purposes of the Public Utility Holding Company Act "control" and "controlling influence" have been held to "include the power to control and the power to exert a controlling influence as well as the actual exercise of such power." *Public Service Corporation v. Securities and Exchange Commission*, 129 F. (2d) 899, 903 (C.C.A. 3); *Detroit Edison Co. v. Securities*

and *Exchange Commission*, 119 F. (2d) 730, 739 (C.C.A. 6) cert. den. 314 U.S. 618. The record here shows more than the mere seeking of advice or the existence of latent powers. We have here direct admissions by the appellant that he sought at all times to carry out his father's "instructions" and that he did whatever his father's attorneys-in-fact told him to do.

The Supreme Court has emphasized that questions of control turn upon "actualities" not on any "artificial test" and are issues "of fact to be determined by the special circumstances of each case". *Rochester Telephone Corporation v. United States*, 307 U.S. 125, 145. It is clearly in that sense that the term "control" is used in the *Uebersee* case. As the Court emphasized, the purpose of the Trading with the Enemy Act is to "reach enemy interests which masqueraded under . . . innocent fronts" (332 U.S. at 485) and to insure that "no innocent appearing device would become a Trojan horse" (332 U.S. at 488). That purpose would be defeated if the only forms of control which were judicially recognized were those resting on legally enforceable undertakings unequivocally expressed which left no significant rights in the ostensibly innocent holder. As a practical matter, control exercised by placing property in the hands of a child who is dependent on the parent's good will for both his present and future economic wellbeing, and who has shown by past experience that he can be relied upon to obey parental instructions unquestionably, may well be far more effective than a control

expressed in formal agreements arrived at between parties dealing at arm's length. To hold that only property in which the enemy retained formal legal rights of ownership is subject to the Act would be to hold that only obvious and avowed cloaking devices could be thwarted while subtler and often more effective techniques of achieving the same result would be unchecked.

In the *Uebersee* case the Court did not pass on the question whether one who is a "national" of an enemy country by reason of action for the benefit of or on behalf of a national of such country could recover vested property. The Court did hold that a "national" of a *foreign* country might recover vested property if he had no "enemy taint." It did so on the ground that it would not without very strong proof attribute to Congress an intention to cut off the rights of "friendly or neutral foreign interests" (332 U.S. at 487). In doing so, however, the Court also declared that the definitions of "enemy" contained in Section 2 of the Act must now be regarded as "merely illustrative, not exclusionary" (322 U.S. at 488-9) and that the "concept of enemy" must be "given a scope which helps the amendment of 1941 fulfill its mission" (332 U.S. at 489). The Court did not attempt to define the new scope to be given to the concept of enemy, saying that that definition "must await legislative or judicial clarification" (332 U.S. at 490).

We submit that in defining the new concept of enemy, the executive definition of "national of a designated enemy country" which has underlain the

administration of the Trading with the Enemy Act throughout this war and which has received implicit approval by the Congress should serve as the appropriate model. Nothing in the *Uebersee* decision can be construed as a rejection of that definition; on the contrary, the Court's description of the Act as conferring on the President "new 'flexible powers' . . . to deal effectively with property interests which had either an open or concealed enemy taint" indicates that the definition of enemy national which the President found necessary to deal effectively with property interests having an enemy taint should be deemed the controlling definition.

The appellant clearly comes within that definition. On the evidence and the findings of the District Court, there can be no doubt that the appellant, in his dealings with the land and the income from it, acted "directly or indirectly for the benefit of or on behalf of" Yotaro Fujino, a national of Japan and an enemy. Accordingly, he is to be regarded as coming himself within the new concept of enemy to which the Court referred in the *Uebersee* case and as disqualified for that reason from recovering the land. This does not mean that he is an enemy for all purposes. Under the definition in the executive orders appellant is a national of a designated enemy country only "to the extent that" he has acted for the benefit of an enemy. As to property in respect of which he did not so act, he does not come within the definition. But in his dealings with the land he unquestionably did act in his father's interest and for his father's benefit and,

accordingly, to the extent of his interest in the land he is to be regarded as himself an enemy who is disqualified from recovering the land.

C. The Trading with the Enemy Act as so construed impairs no constitutional right of the appellant.

The appellant's final contention is that the Act, if construed to empower the Custodian to retain property which was controlled by Yotaro Fujino would deny him constitutional rights under the Fifth Amendment. He argues that a citizen of the United States, even though controlled by and acting in the interest and for the benefit of an enemy cannot be regarded as himself an enemy to the extent of such action (App. Br., pp. 45-7). And he argues that if Yotaro Fujino's control over the property amounted to anything short of complete dominion, then there must be some interest remaining in the appellant which could not constitutionally be taken. Because of the presence of such an interest, he insists, the entire property must now be returned (App. Br., pp. 43-5).

The appellant's arguments would remove from the Act the concept of control as a basis for vesting. To say that if "anything less than complete dominion" is shown the property must be returned is to say that it must be returned unless it is enemy owned. "Complete dominion" is the equivalent of ownership. We think that such complete dominion by an enemy was here shown, but we think it was not necessary to show it. The law has frequently recognized and acted on the basis of a control which falls far short of complete

dominion. In tax cases the Courts have repeatedly applied the rule that "transactions, which do not vary control or change the flow of economic benefits, are to be dismissed from consideration." *Higgins v. Smith*, 308 U.S. 473, 476. They have gone father than it is necessary to go here in disregarding "technical considerations, niceties of the law of trusts or conveyances, or the legal paraphernalia which inventive genius may construct as a refuge from surtaxes." *Helvering v. Clifford*, 309 U.S. 331, 334. They have held that "the power to dispose of income is the equivalent of ownership of it." *Helvering v. Horst*, 311 U.S. 112, 118. They have disregarded trusts, which although irrevocable, merely resulted in a "temporary reallocation of income within an intimate family group." *Helvering v. Clifford, supra*, 335. They have reached this result although the grantor has permanently deprived himself of the legal right to demand the corpus or any of its income and even though the members of the family group for whose support he was providing were of age so that the grantor was under no legal obligation to provide for their support. *Commissioner v. Buck*, 120 F. (2d) 775 (C.C.A. 2); *Littel v. Commissioner*, 154 F. (2d) 922 (C.C.A. 2) and cases cited. The test has been whether the parent, despite the trust, continued to "control the family purse strings." *Gaylord v. Commissioner*, 153 F. (2d) 408, 413 (C.C.A. 9). Similarly, the courts have disregarded the establishment of family partnerships where no real contribution of capital or essential services was made by the spouse

or child. *Commissioner v. Tower*, 327 U.S. 280; *Lusthaus v. Commissioner*, 327 U.S. 293; *Losh v. Commissioner*, 145 F. (2d) 456 (C.C.A. 10); *Grant v. Commissioner*, 150 F. (2d) 915 (C.C.A. 10).¹⁷

The law of prize, to which the Trading with the Enemy Act is historically and constitutionally related,¹⁸ furnishes an even closer analogy. Courts of prize have often declared that the right of the sovereign to seize and retain property as enemy in character does not turn on satisfaction of common law rules as to passage of title.¹⁹ In particular, they have repeatedly disregarded transfers of title to vessels where the former owner or his agent remained in control of the vessel. *The Andromeda*, 2 Wall. 481, 489; *The Benito Estenger*, 176 U.S. 568; *The Jemmy*, 4 C. Rob. 31, 165 Eng. Rep. 565; *The Sechs Geschwistern*, 4 C. Rob. 100, 165 Eng. Rep. 549. In *The Benito Estenger*, *supra*, the Court said, quoting from Hall and Storey,

The transfer is not held to be good if it is subjected to any condition or even tacit understanding by which the vendor keeps an interest in the vessel or its profits, or control over it, a power

¹⁷In bankruptcy cases, also, the courts have insisted that inter-family transactions "require careful scrutiny," *Wilson v. Robinson*, 83 F. (2d) 397 (C.C.A. 2), cert. dismissed, 299 U.S. 616. *Stroecker v. Patterson*, 220 Fed. 21 (C.C.A. 9); *McKey v. Roetter*, 114 F. (2d) 129 (C.C.A. 7), cert. den. 311 U.S. 691; *Wilson v. Robinson*, *supra*; *Rudin v. Steinbugler*, 103 F. (2d) 333 (C.C.A. 2); *Merriam v. Venida Blouse Corp.*, 23 F. Supp. 659 (S.D.N.Y.)

¹⁸See *Stoehr v. Wallace*, 255 U.S. 239, 242.

¹⁹Cf.: "'Enemy property' is a technical phrase peculiar to prize courts, and depends upon principles of public policy as distinguished from the common law." *The Benito Estenger*, 176 U.S. 568, 571 (1900).

of revocation, or a right to its restoration at the conclusion of the war. [p. 578]

Anything tending to continue the interest of the enemy in the ship vitiates a contract of this description altogether. [p. 579]

Similarly, in *The Island Belle*, Fed. Cas. No. 7107 (D.C. E.D. Pa.), the Court stated "No change of property is recognized where the disposition and control of the vessel continues in the former agent of her former hostile proprietors" (p. 171).

The rule for which we here contend need not go so far as that declared in the prize cases. We need not assert a power to seize property with respect to which there is "anything tending to continue the interests of the enemy". It is enough to hold that a retention by the enemy of powers to control property—whether those powers be expressed in terms of legally enforceable agreements or legally recognizable reservations from a grant or whether they rest in personal relationships and powers of economic coercion over the holder—should be sufficient to characterize the property as enemy property.

Nor is there anything in the fact that the appellant is a citizen of the United States which precludes a holding that the land which he purports to own is enemy in character. Courts have frequently sustained the seizure of property held in the name of American citizens upon finding that the property was in reality owned or controlled by enemies. *Stoechr v. Wallace*, *supra*; *Kind v. Clark*, *supra*; *Standard Oil Co. v.*

Clark, supra. And the concept of enemy character for purposes of determining the scope of the belligerent power of seizure is not a technical one. Since *Miller v. United States*, 11 Wall. 268, 310-12 (1870), there has been no room for doubt that under some circumstances the property of citizens of the United States could constitutionally be seized as enemy property. Such a seizure may occur where the United States citizen is an inhabitant of the enemy territory, regardless of his personal loyalty. *Miller v. United States, supra*; *Faber v. United States*, 10 F. Supp. 602, 605 (Ct. Cl.), cert. den. 296 U.S. 596; *Kahn v. Garvan*, 263 Fed. 909, 915 (S.D. N.Y.). It may occur also if the American citizen acts in the interest of the enemy. In the *Miller* case the Court declared (11 Wall. at 312) that

No recognized usage of nationals excludes from the category of enemy those who act with, or aid or abet and give comfort to enemies. . . .

One form of acting with the enemy may be the mingling with the citizen's goods of enemy property to which a friendly character is to be sought to be given. *The St. Nicholas*, 1 Wheat. 417; *The Fortuna*, 3 Wheat. 236; *The Amiable Isabella*, 6 Wheat. 1. The rule laid down in the Executive Orders that one who acts in the interest of and for the benefit of an enemy is himself an enemy to the extent of such action would seem clearly to come within the principles laid down by these cases.

In short the belligerent power to seize enemy property has always stood outside the requirements of the

Fifth Amendment, which have been held to extend to any "person" whether citizen or alien. *Russian Volunteer Fleet v. United States*, 282 U.S. 481. If, therefore a seizure can legitimately be brought within the scope of that belligerent power, its validity is established. We think there is no warrant for saying that in determining whether a particular seizure is within the limits permitted by the Constitution the Courts can look only to formal ownership, or to formal agreements reserving all the elements of ownership, and must ignore other means of control which as a practical matter are no less effective in leaving the property at the enemy's disposition and under his dominion.

CONCLUSION.

For the foregoing reasons the judgment below should be affirmed.

Dated, San Francisco,
July 15, 1948.

Respectfully submitted,

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IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT.

KANAME FUJINO, *Appellant*,

v.

TOM C. CLARK, Attorney General of the United States,
Appellee.

On Appeal from the District Court of the United States
for the Territory of Hawaii.

**MEMORANDUM ON BEHALF OF KANAME FUJINO,
APPELLANT.**

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FILED
SEP 24 1948
PAUL P. O'BRIEN,
CLERK

IN THE
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FOR THE NINTH CIRCUIT.

No. 11,786.

KANAME FUJINO, *Appellant*,

v.

TOM C. CLARK, Attorney General of the United States,
Appellee.

On Appeal from the District Court of the United States
for the Territory of Hawaii.

**MEMORANDUM ON BEHALF OF KANAME FUJINO,
APPELLANT.**

The District Court committed a basic error of law which corrupts the whole judgment in this case. The Court held that the recorded power of attorney (Exhibit E, R. 479) executed by appellant's father was insufficient to authorize his attorneys in fact to do his bidding and make a gift of the land to his son.¹ We have pointed out this error in our

¹ A similar power of attorney (Exhibit F, R. 483) was executed by appellant's mother and likewise recorded in the Land Court on the same day, March 17, 1941. (R. 483)

brief, pp. 11-23. It is clear that the lower court erred both as a matter of local law and general law. Does this error require a reversal of the judgment? We say that it does.

I.

THE POWER OF ATTORNEY AND DEED IN QUESTION WERE REGISTERED IN THE LAND COURT.

At oral argument there were questions from the bench as to the effect of the registration of the power of attorney and the deed of gift under the land court system. In Hawaii we have the Torrens' Title System. Under that system, land is registered in the Land Court of the Territory of Hawaii and all deeds, mortgages, powers of attorney, encumbrances, claims and trusts (express and implied) of every character must be noted on the certificate of title. Once a certificate of title is obtained, the certificate itself is conclusive against all the world of the ownership and of the facts therein stated. Any claimant who may be adversely affected in either original registration or subsequent transfer through error, fraud, mistake or negligence, must proceed in the Land Court to establish his claim.

² The power of attorney (Exhibit E, R. 479) was registered in the Land Court on March 17, 1941 and in obedience to the statute was "noted" on the father's certificate of title (R. 479). The deed (Exhibit H, R. 501) from the father to appellant was also registered in the Land Court, and on the basis of that instrument, Certificate of Title No. 2407 issued to appellant on May 19, 1941 (R. 153-155).

II.

THE EFFECT OF THE LAND COURT STATUTE.

The land court statute is contained in chapter 307, Revised Laws, Hawaii, 1945.

Section 12647, R. L. H. 1945, provides:

² In *Re Rosenbled*, 24 Haw. 208, 307; *Re School Lane Land Title*, 32 Haw. 680.

The original certificate in the Registrar's book * * * and also the owner's duplicate certificate shall be received as evidence in all courts of the Territory and shall be conclusive as to all matters contained therein, except as otherwise provided in this chapter.

This means that the certificate of title is the complete evidence of ownership.

Section 12649 provides:

The act of registration shall be the operative act to convey or affect the land.

When the Registrar of the Land Court registered the deed and issued a certificate of title to appellant, title to the land passed.

Section 12651 provides:

All interests in registered land less than an estate in fee simple shall be registered by filing with the Assistant Registrar the instrument creating or transferring or claiming such interest and by a brief memorandum thereof made upon the certificate of title and signed by him.

Section 12664 requires trusts to be noted on the certificate, and Section 12667 requires claimants under an implied or constructive trust to file a statement with the Registrar for registration.

The purpose of Sections 12651, 12664 and 12667 is to oblige persons to disclose trusts (express and implied) affecting registered land, and to afford the statutory framework for the claimant of an interest in registered land to have his claim determined by the court and noted on the certificate.

It will be observed that the Torrens Title System is not the ordinary recording act routine whereby a person dealing with real property simply files his instrument in the record office. Under the Land Court system, it is not only a careful administrative system, but also involves judicial action. Section 12652 requires the Assistant Registrar of

the Land Court in case of doubt upon any question under the system to refer the matter to the judge of the Land Court for decision. Section 12652 requires judicial action in all cases of doubt:

Doubtful Questions

Where the assistant registrar is in doubt upon any question * * * the question shall be referred to the court for decision.

Section 12692 requires that any person dealing with land court property by power of attorney must file his power of attorney with the Assistant Registrar. The power of attorney in question was filed with the Assistant Registrar of the Land Court who accepted it in performance of his statutory duty together with the deed conveying the land from the father to appellant as an effective transfer of the title and accordingly issued to appellant a certificate of title evidencing complete ownership in him.

III.

GOVERNMENT'S DEFENSES INCLUDE THE ALLEGED INVALIDITY OF THE POWER OF ATTORNEY.

The answer filed on behalf of the Government interposed three defenses, first that the power of attorney was invalid and that "by reason of said lack of authority * * * the real and beneficial ownership of said real property continued to be in Yotaro Fujino" (R. 29).

As a separate and second defense, the Government alleged that the conveyance was effected by appellant, his father, and the attorneys in fact "in a conspiracy and with the purpose and intent to defraud and to continue to defraud the United States" (R. 30).

The third separate defense was that since March 21, 1941, and the Vesting Order No. 2724, December 3, 1943, (R. 17) appellant "acted directly and indirectly for the benefit or on behalf of Yotaro Fujino * * * and plain-

tiff is therefore a national of a foreign country * * * and as such has no standing to institute or command this action" (R. 31).

All of the evidence adduced in this case was produced by appellant. There was no evidence of any sham, fraud or conspiracy, and the District Court made no finding that the transaction was a sham or fraud which would authorize a seizure and confiscation under Section 7 (c) of the Act. Had there been any fraud or had the transaction been a sham, then the beneficial ownership would have remained in the alien father and could be vested under Section 7 (c) of the Act.

The District Court did find:

In holding the record title to the land plaintiff has acted for and on behalf of his father and has been controlled by him (R. 55).

It is our contention that the error of law made by the trial court as to the legal effect as to the recorded power of attorney led the court into the error of concluding that the beneficial ownership remained in the father. This is clear in the court's decision under "Comment." Immediately after stating the findings of fact, the court gives the key to its entire decision by saying:

In the first place the plaintiff has no title to the real property. True his father, as a part of his plan, admittedly intended to make a gift of it to him, but the means employed rendered the execution of his plan ineffective (Emphasis supplied, R. 55).

Of course, if the "means employed," i.e., the power of attorney was "ineffective," then as a matter of law no title passed from the father to the son. It is clear that this is what Judge MacLaughlin meant when he said in finding that "the beneficial ownership of the land" remained in the father (R. 55). The same error of law crept into his conclusion of law D. 1, when the court held that the real property in question was:

Property "owing or belonging to or held for, by, on account of or on behalf of or for the benefit of, an enemy" (R. 59).

IV.

ERRORS OF LAW BY THE DISTRICT COURT UNDER SECTION 5 (b).

The court then assumes that the power of attorney was effective but denies recovery under Section 5 (b) of the Act. From this point on the decision of the court rests on two conclusions of law, and we contend the court erred in both. First that the acts done prior to war showing filial ties (appellant's gifts to his sisters and the wedding gift to the brother of an employee) and the payment of his father's federal income tax, after hostilities) do not constitute "control" which Congress had in mind in authorizing the seizure and confiscation of property of an American citizen. The second error of law by the District Court is in the construction of Section 5 (b) in which he placed the burden of proof upon appellant to prove that he was not controlled by his father. The court said:

The plaintiff has failed to meet the burden of proving (1) that he has an "interest, right or title" to the real property (here the court has in mind the lack of authority under the power of attorney) * * * and that if he has, (2) he holds the same "for his own * * * and sole use and benefit" (Section 5 (b) of the Act). (R. 55)

What the court is here saying is that an American citizen who holds title to land situated in the United States, who by his accident of birth happens to have an alien father who deeded the property to him prior to the outbreak of war is obliged to prove not only his citizenship but also the fact that he is not controlled by an alien in order to avoid confiscation of his property.

To reach this result the Government asserts that the President of the United States acting through a desig-

nated agency may by executive order find that an American citizen is a national of an enemy country and may confiscate his property under Section 5 (b) of the Act, and that when the American citizen brings his action for recovery which Congress has provided, he is obliged to prove not only his American citizenship but satisfy the court by assuming the burden of proof that he is not under the control of an alien. This construction of the Act is necessary to affirm the judgment below. We say that if this is the proper construction of the Trading With the Enemy Act it is unconstitutional. This startling construction is urged by the Government in face of the statutory definition of the word enemy as contained in Section 2:

The word "enemy" as used herein, shall be deemed to mean, * * * such * * * individuals as may be natives, citizens or subjects of any nation with which the United States is at war, *other than citizens of the United States* * * * (Emphasis supplied).

We suggest that this court should be slow to adopt such a construction of the Act which will result in clothing the Alien Property Custodian with the power to designate an American citizen as an enemy and then empower him to confiscate a citizen's property.

The evidence in this case is largely documentary, plus a deposition, and undisputed oral testimony. There is no conflict in the evidence. The case does not depend upon the weight of the evidence or the credibility of witnesses. In these circumstances it is well settled that under Rule 52 (a) (as under the old equity practice) this court not only has the right but is charged with the burden of reviewing the findings of fact as well as the conclusions of law of the trial court.

Equitable Life v. Irelan, 123 F. 2d. 462, 464 (9 CCA 1941).

Fleming v. Palmer, 123 F. 2d. 749, 751 (1 CCA 1941).

Stone v. Stone, 136 F. 2d. 761, 764 (CCA D. C. 1943).

Himmel v. Serrick, 122 F. 2d. 740, 742 (7 CCA 1941).

United States v. Mitchell, 104 F. 2d. 343, 346 (8 CCA 1939).

In re Chicago & N. W. R. Co., 110 F. 2d. 425, 427 (7 CCA 1940).

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Chesapeake & Ohio RR. v. Martin, 283 U. S. 209, 216 (1931).

The effect of the rule and the powers and duty of the reviewing court has recently been authoritatively settled.

United States v. United States Gypsum Co., 68 S. Ct. 525, 542 (1948 Adv.).

The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however. A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

This case is an appropriate one for applying the rule laid down by the Supreme Court. This is particularly so in view of the error of law made by the trial court on the sufficiency of the power. It is impossible to say that the trial judge did not make his "finding a fact" that the father retained "ownership of the land" (R. 55) under the erroneous supposition that the power was invalid for purposes of making a gift. The mere fact that a part of judge's decision is labeled "Findings of Fact" does not put the matter beyond the reach of an appellate court. If the rule were otherwise errors of law implicit in the "findings of fact" (as here) would stand uncorrected.

We submit that the judgment below should be reversed and the cause remanded with directions to enter judgment for appellant. If the court has any doubt as to the propriety of such a direction then the cause should be re-

manded with directions to the trial court to make findings of fact freed from the errors of law committed in this case.

Dated, Washington, D. C., September 22, 1948.

Respectfully submitted,

J. GARNER ANTHONY,
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IN THE
United States Court of Appeals

FOR THE NINTH CIRCUIT.

KANAME FUJINO, *Appellant*,

v.

TOM C. CLARK, Attorney General of the United States,
Appellee.

On Appeal from the District Court of the United States
for the Territory of Hawaii.

**MEMORANDUM ON BEHALF OF KANAME FUJINO,
APPELLANT.**

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FILED
SEP 24 1948

PAUL P. O'BRIEN,

CLERK

IN THE
United States Court of Appeals

FOR THE NINTH CIRCUIT.

No. 11,786.

KANAME FUJINO, *Appellant*,

v.

TOM C. CLARK, Attorney General of the United States,
Appellee.

On Appeal from the District Court of the United States
for the Territory of Hawaii.

**MEMORANDUM ON BEHALF OF KANAME FUJINO,
APPELLANT.**

The District Court committed a basic error of law which corrupts the whole judgment in this case. The Court held that the recorded power of attorney (Exhibit E, R. 479) executed by appellant's father was insufficient to authorize his attorneys in fact to do his bidding and make a gift of the land to his son.¹ We have pointed out this error in our

¹ A similar power of attorney (Exhibit F, R. 483) was executed by appellant's mother and likewise recorded in the Land Court on the same day, March 17, 1941. (R. 483)

brief, pp. 11-23. It is clear that the lower court erred both as a matter of local law and general law. Does this error require a reversal of the judgment? We say that it does.

I.

THE POWER OF ATTORNEY AND DEED IN QUESTION WERE REGISTERED IN THE LAND COURT.

At oral argument there were questions from the bench as to the effect of the registration of the power of attorney and the deed of gift under the land court system. In Hawaii we have the Torrens' Title System. Under that system, land is registered in the Land Court of the Territory of Hawaii and all deeds, mortgages, powers of attorney, encumbrances, claims and trusts (express and implied) of every character must be noted on the certificate of title. Once a certificate of title is obtained, the certificate itself is conclusive against all the world of the ownership and of the facts therein stated. Any claimant who may be adversely affected in either original registration or subsequent transfer through error, fraud, mistake or negligence, must proceed in the Land Court to establish his claim.

² The power of attorney (Exhibit E, R. 479) was registered in the Land Court on March 17, 1941 and in obedience to the statute was "noted" on the father's certificate of title (R. 479). The deed (Exhibit H, R. 501) from the father to appellant was also registered in the Land Court, and on the basis of that instrument, Certificate of Title No. 2407 issued to appellant on May 19, 1941 (R. 153-155).

II.

THE EFFECT OF THE LAND COURT STATUTE.

The land court statute is contained in chapter 307, Revised Laws, Hawaii, 1945.

Section 12647, R. L. H. 1945, provides:

² In *Re Rosenbled*, 24 Haw. 208, 307; *Re School Lane Land Title*, 32 Haw. 680.

The original certificate in the Registrar's book * * * and also the owner's duplicate certificate shall be received as evidence in all courts of the Territory and shall be conclusive as to all matters contained therein, except as otherwise provided in this chapter.

This means that the certificate of title is the complete evidence of ownership.

Section 12649 provides:

The act of registration shall be the operative act to convey or affect the land.

When the Registrar of the Land Court registered the deed and issued a certificate of title to appellant, title to the land passed.

Section 12651 provides:

All interests in registered land less than an estate in fee simple shall be registered by filing with the Assistant Registrar the instrument creating or transferring or claiming such interest and by a brief memorandum thereof made upon the certificate of title and signed by him.

Section 12664 requires trusts to be noted on the certificate, and Section 12667 requires claimants under an implied or constructive trust to file a statement with the Registrar for registration.

The purpose of Sections 12651, 12664 and 12667 is to oblige persons to disclose trusts (express and implied) affecting registered land, and to afford the statutory framework for the claimant of an interest in registered land to have his claim determined by the court and noted on the certificate.

It will be observed that the Torrens Title System is not the ordinary recording act routine whereby a person dealing with real property simply files his instrument in the record office. Under the Land Court system, it is not only a careful administrative system, but also involves judicial action. Section 12652 requires the Assistant Registrar of

the Land Court in case of doubt upon any question under the system to refer the matter to the judge of the Land Court for decision. Section 12652 requires judicial action in all cases of doubt:

Doubtful Questions

Where the assistant registrar is in doubt upon any question * * * the question shall be referred to the court for decision.

Section 12692 requires that any person dealing with land court property by power of attorney must file his power of attorney with the Assistant Registrar. The power of attorney in question was filed with the Assistant Registrar of the Land Court who accepted it in performance of his statutory duty together with the deed conveying the land from the father to appellant as an effective transfer of the title and accordingly issued to appellant a certificate of title evidencing complete ownership in him.

III.

GOVERNMENT'S DEFENSES INCLUDE THE ALLEGED INVALIDITY OF THE POWER OF ATTORNEY.

The answer filed on behalf of the Government interposed three defenses, first that the power of attorney was invalid and that "by reason of said lack of authority * * * the real and beneficial ownership of said real property continued to be in Yotaro Fujino" (R. 29).

As a separate and second defense, the Government alleged that the conveyance was effected by appellant, his father, and the attorneys in fact "in a conspiracy and with the purpose and intent to defraud and to continue to defraud the United States" (R. 30).

The third separate defense was that since March 21, 1941, and the Vesting Order No. 2724, December 3, 1943, (R. 17) appellant "acted directly and indirectly for the benefit or on behalf of Yotaro Fujino * * * and plain-

tiff is therefore a national of a foreign country * * * and as such has no standing to institute or command this action" (R. 31).

All of the evidence adduced in this case was produced by appellant. There was no evidence of any sham, fraud or conspiracy, and the District Court made no finding that the transaction was a sham or fraud which would authorize a seizure and confiscation under Section 7 (c) of the Act. Had there been any fraud or had the transaction been a sham, then the beneficial ownership would have remained in the alien father and could be vested under Section 7 (c) of the Act.

The District Court did find:

In holding the record title to the land plaintiff has acted for and on behalf of his father and has been controlled by him (R. 55).

It is our contention that the error of law made by the trial court as to the legal effect as to the recorded power of attorney led the court into the error of concluding that the beneficial ownership remained in the father. This is clear in the court's decision under "Comment." Immediately after stating the findings of fact, the court gives the key to its entire decision by saying:

In the first place the plaintiff has no title to the real property. True his father, as a part of his plan, admittedly intended to make a gift of it to him, but the means employed rendered the execution of his plan ineffective (Emphasis supplied, R. 55).

Of course, if the "means employed," i.e., the power of attorney was "ineffective," then as a matter of law no title passed from the father to the son. It is clear that this is what Judge MacLaughlin meant when he said in finding that "the beneficial ownership of the land" remained in the father (R. 55). The same error of law crept into his conclusion of law D. 1, when the court held that the real property in question was:

Property "owing or belonging to or held for, by, on account of or on behalf of or for the benefit of, an enemy" (R. 59).

IV.

ERRORS OF LAW BY THE DISTRICT COURT UNDER SECTION 5 (b).

The court then assumes that the power of attorney was effective but denies recovery under Section 5 (b) of the Act. From this point on the decision of the court rests on two conclusions of law, and we contend the court erred in both. First that the acts done prior to war showing filial ties (appellant's gifts to his sisters and the wedding gift to the brother of an employee) and the payment of his father's federal income tax, after hostilities) do not constitute "control" which Congress had in mind in authorizing the seizure and confiscation of property of an American citizen. The second error of law by the District Court is in the construction of Section 5 (b) in which he placed the burden of proof upon appellant to prove that he was not controlled by his father. The court said:

The plaintiff has failed to meet the burden of proving (1) that he has an "interest, right or title" to the real property (here the court has in mind the lack of authority under the power of attorney) * * * and that if he has, (2) he holds the same "for his own * * * and sole use and benefit" (Section 5 (b) of the Act). (R. 55)

What the court is here saying is that an American citizen who holds title to land situated in the United States, who by his accident of birth happens to have an alien father who deeded the property to him prior to the outbreak of war is obliged to prove not only his citizenship but also the fact that he is not controlled by an alien in order to avoid confiscation of his property.

To reach this result the Government asserts that the President of the United States acting through a desig-

nated agency may by executive order find that an American citizen is a national of an enemy country and may confiscate his property under Section 5 (b) of the Act, and that when the American citizen brings his action for recovery which Congress has provided, he is obliged to prove not only his American citizenship but satisfy the court by assuming the burden of proof that he is not under the control of an alien. This construction of the Act is necessary to affirm the judgment below. We say that if this is the proper construction of the Trading With the Enemy Act it is unconstitutional. This startling construction is urged by the Government in face of the statutory definition of the word enemy as contained in Section 2:

The word "enemy" as used herein, shall be deemed to mean, * * * such * * * individuals as may be natives, citizens or subjects of any nation with which the United States is at war, *other than citizens of the United States* * * * (Emphasis supplied).

We suggest that this court should be slow to adopt such a construction of the Act which will result in clothing the Alien Property Custodian with the power to designate an American citizen as an enemy and then empower him to confiscate a citizen's property.

The evidence in this case is largely documentary, plus a deposition, and undisputed oral testimony. There is no conflict in the evidence. The case does not depend upon the weight of the evidence or the credibility of witnesses. In these circumstances it is well settled that under Rule 52 (a) (as under the old equity practice) this court not only has the right but is charged with the burden of reviewing the findings of fact as well as the conclusions of law of the trial court.

Equitable Life v. Irelan, 123 F. 2d. 462, 464 (9 CCA 1941).

Fleming v. Palmer, 123 F. 2d. 749, 751 (1 CCA 1941).

Stone v. Stone, 136 F. 2d. 761, 764 (CCA D. C. 1943).

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The effect of the rule and the powers and duty of the reviewing court has recently been authoritatively settled.

United States v. United States Gypsum Co., 68 S. Ct. 525, 542 (1948 Adv.).

The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however. A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

This case is an appropriate one for applying the rule laid down by the Supreme Court. This is particularly so in view of the error of law made by the trial court on the sufficiency of the power. It is impossible to say that the trial judge did not make his "finding a fact" that the father retained "ownership of the land" (R. 55) under the erroneous supposition that the power was invalid for purposes of making a gift. The mere fact that a part of judge's decision is labeled "Findings of Fact" does not put the matter beyond the reach of an appellate court. If the rule were otherwise errors of law implicit in the "findings of fact" (as here) would stand uncorrected.

We submit that the judgment below should be reversed and the cause remanded with directions to enter judgment for appellant. If the court has any doubt as to the propriety of such a direction then the cause should be re-

manded with directions to the trial court to make findings of fact freed from the errors of law committed in this case.

Dated, Washington, D. C., September 22, 1948.

Respectfully submitted,

J. GARNER ANTHONY,
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Of Counsel.

No. 11,789

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

PETRUS TOL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

FRANK J. HENNESSY,

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Post Office Building, San Francisco, California,

Proctor for United States of America.

JOHN H. BLACK,

EDWARD R. KAY,

HENRY W. SCHALDACH,

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Of Counsel for United States of America.

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No. 11,789

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

PETRUS TOL,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

STATEMENT OF PLEADINGS AND JURISDICTION.

In this case a libel *in personam* was filed by Appellant claiming damages and maintenance and cure against Appellee pursuant to the War Shipping Administration Clarification Act 50 USC Appx. 1291, thereby invoking the provisions of The Suits in Admiralty Act 46 USCA 742.

The cause of action for damages is based upon alleged negligence on the part of Appellee and unseaworthiness of its vessel assertedly due to Appellee's failure to supply and keep in order reels on said vessel SS "H. Weir Cook" for the handling of wire mooring cables or lines.

The case was heard before Hon. Louis E. Goodman, Judge of the United States District Court. A decree

in accordance with the findings of fact and conclusions of law was entered on May 22, 1947 wherein Appellant was denied recovery on his claim for damages and was awarded the sum of \$1,277.50 maintenance, and \$58.85 for unpaid wages, together with costs in the amount of \$142.52—making a total of \$1,478.87. Thereafter on June 5, 1947 Appellee deposited in the Registry of the District Court the sum of \$1,478.87. On June 17, 1947 Appellant accepted the tender of Appellee, and on June 20, 1947 caused to be filed a Satisfaction of Judgment.

Appellant appeals from the findings of fact and the decree of the above-entitled Court denying Appellant damages.

STATEMENT OF THE CASE.

We find it necessary to set forth a statement of the case since Appellant has omitted to do so in conformity with the rule of this Honorable Court.

Appellant signed Foreign Articles as an able-bodied seaman on March 31, 1944 at San Francisco, California, for a foreign voyage aboard the SS "H. Weir Cook", a vessel owned and operated by the United States of America by and through the War Shipping Administration. (Tr. 196.)

On or about June 5, 1944 while the said vessel was proceeding toward Canton Island in the Phoenix group, in the Southwest Pacific, Appellant was assisting other members of the crew in coiling on deck a mooring line which was being pulled out of the hatch

(Tr. 201). Appellant testified that in the process of assisting another seaman to pull this inch and a half steel cable or line out from the hatch and over the hatch coaming the said steel line in some manner struck him in the region of the left temple (Tr. 202). This did not cause him to interrupt his work and he finished his watch (Tr. 230). The blow was not sufficient to cause Appellant to believe that he had received anything other than "just a bump", and it did "not hurt very much" (Tr. 226). He completed his job and went to lunch, at which time he noted that he had "a kind of a blue mark" on his left temple (Tr. 227). The matter was not of sufficient importance to him to report the incident to his superiors (Tr. 226) nor to anyone else; he "just let it pass" (Tr. 229). The same evening Appellant stood his next regular watch, and the next morning there was no visible mark or discoloration, and he paid no further attention to the affair (Tr. 226). Appellant further testified that he continued standing his regular watches for the next two days (Tr. 231). There was further testimony to the effect that while standing at the wheel he suddenly fainted and was unconscious for "a very short time" (Tr. 219 and 231) and that he then finished his watch (Tr. 207). Appellant was not sure whether the fainting episode occurred before or after the alleged accident (Tr. 228). In any event, he said he was constipated and that he fainted (Tr. 206). The following morning he was taken ashore at Canton Island (Tr. 206) and treated by Navy doctors for constipation for a period of approximately one week, during none of which time did he complain of

having been struck on the head or injured on board the vessel (Tr. 229).

Appellant returned to the ship and stood his regular watches for a period of 10 days or so while the vessel proceeded from Canton Island to Honolulu (Tr. 208-209) and he stated that he felt all right during that trip (Tr. 210).

Upon arriving at Honolulu, and while sitting in his room aboard the vessel, Appellant noticed that his left hand began to feel peculiar (Tr. 209). He went ashore at Honolulu, and while ashore he began to develop symptoms in his left arm and left leg. Thereafter, on June 26, 1944, he was taken to Queen's Hospital in Honolulu (Tr. 209) where the United States Public Health Service doctor diagnosed his condition as a left hemiplegia caused by "cerebral and generalized arteriosclerosis, with cerebral thrombosis and encephalomalacia" (Tr. 385). He remained at the hospital in Honolulu as an in-patient until October 16, 1944 (Tr. 385) and was then transported by vessel to San Francisco and admitted on October 23, 1944, as an in-patient at the Marine Hospital where a history was obtained by the Medical Officer in which it is reported that Appellant's chief complaint was "stroke", but no history of injury was given (Tr. 384). The diagnosis was substantially the same as that reported by the United States Public Health Doctor at Honolulu. He was discharged from further hospitalization and treatment October 30, 1944 (Tr. 383). On that date he returned to his home in Lyle, Washington (Tr. 210).

Appellant was examined at the city of The Dalles, Oregon, February 15, 1947 by Dr. John Raaf, Neuro-Surgeon, whose diagnosis was that Appellant was suffering from a left hemiplegia as the result of a cerebral thrombosis and softening of the brain (Tr. 37). It was the Doctor's opinion that the incident of the blow on the head was not the cause of his disability (Tr. 41). Dr. Raaf further stated that at the time Appellant was discharged from the Marine Hospital in San Francisco (October 30, 1944) his condition was practically stationary (Tr. 87).

SUMMARY OF THE ARGUMENT.

Appellee's position in this case is summarized as follows:

1. Appellant failed to meet the burden of proof in establishing that Appellee was guilty of negligence or that its vessel was unseaworthy by reason of the absence of so-called reels for mooring cables or lines. The evidence in this respect was overwhelming that the type of ship here involved, to-wit, a Liberty vessel, as well as Victory ships, do not have reels for mooring cables or lines and that mooring cables are stored below deck from where they are customarily hauled out on deck by hand in the manner that was employed at the time of the alleged injury. It was also testified to by a safety engineering expert that this was a safe practice. The preponderance of the evidence supports the trial Court's findings that the vessel was seaworthy and that Appellee was not negligent.

2. Even if it be asserted that the vessel should have carried a reel for mooring lines, which of course is denied, there is no showing in the record that the absence of such reels proximately caused or contributed to the alleged injury or disability suffered by Appellant.

3. Assuming that Appellant sustained an injury as alleged, the preponderance of the medical evidence is that his condition was unrelated to the alleged injury, but was, instead, due to a cerebral and generalized arteriosclerosis with cerebral thrombosis and softening of the brain—a condition which was not caused or contributed to by the claimed trauma.

4. The Court's allowance of one year's maintenance was based upon the medical testimony in the record and was in conformity with the law limiting maintenance to a reasonable period. Nor did the District Court err in denying Appellant's claim for recovery because of so-called "nursing care" allegedly rendered by Appellant's wife at home. There was no adequate proof of the necessity for such nursing care or, if such care was necessary, that it could not have been obtained at the United States Marine Hospital without cost to anyone. Both on the facts and the law, Appellant is not entitled to such recovery.

5. Denial by the District Court of Appellant's request for a continuance of the trial on the grounds of alleged "surprise of the testimony" of Dr. Raaf, who testified on behalf of Appellee, was not error, since there was no proper showing of surprise nor

any basis upon which the Court could properly continue the case. At the time of Appellant's motion he merely requested the opportunity to have the record transcribed and to consult other medical witnesses.

ARGUMENT.

I. A PREPONDERANCE OF THE EVIDENCE SHOWS THAT THE VESSEL WAS NOT UNSEAWORTHY AND THAT APPELLEE WAS NOT NEGLIGENT.

Appellant seems to lay great stress upon the absence of a so-called reel for mooring cables or lines and seeks to argue that by reason thereof Appellee was negligent and that the vessel was unseaworthy and, further, that this alleged negligence and unseaworthiness caused Appellant's injury.

The preponderance of the evidence clearly supports the District Court's holding that the vessel, which was a Liberty ship, does not customarily or at all have so-called reels for mooring cables or lines. Stanley R. Davis, District Supervisor for the Accident Prevention Bureau of the Waterfront Employer's Association, testified that he had been aboard and had inspected safety conditions on some 150 or more Liberty ships and that none of these vessels was so equipped (Tr. 95-96). Mr. Davis also testified that, as in the case at bar, the mooring lines on all Liberty ships were stored below deck and, when needed, were hauled out of the hatch and coiled on deck by hand, as was done in the instant case.

In being questioned as to how this operation was done, Mr. Davis testified as follows:

“A. They are hauled out ordinarily by hand.

Q. Do you understand the term of ‘Faking’?

A. Yes, sir.

Q. Coiling, and so on?

A. Yes, sir.

Q. Is that the way that is done, taking it from the hatch?

A. The mooring line is hauled from the hatch and ordinarily faked or coiled on the deck.

Q. Alongside the hatch?

A. Alongside the hatch at the point where it will be used when the ship is moored to the dock.

Q. How is that done? By hand?

A. Always, ordinarily, always by hand.

Q. Is it the usual and proper method to have a man stationed at the hatch coaming and another man behind him a few feet, and then to haul it up from the hatch and fake it on the deck alongside the hatch?

A. Yes, sir.” (Tr. 96).

On cross-examination Mr. Davis further testified that he had also been aboard something like 150 to 200 Victory ships for safety inspection and that he had never seen any reels for mooring lines aboard such vessels (Tr. 102-103).

Captain William S. Dodge, who had been sailing Liberty ships for several years, testified on behalf of Appellee that there was no such equipment as reels for storing mooring lines aboard such vessels (Tr. 103). He also testified that mooring lines were always

stored below deck and hauled out by hand when necessary (Tr. 104).

Opposing such impressive testimony there was no competent evidence from which the trial Court could find or even infer that the vessel was unseaworthy or that Appellee was negligent because of the absence aboard the vessel of such reels.

In the cross-examination of Mr. Davis, Appellant's counsel sought to show that there were reels on the decks of certain types of vessels for certain kinds of lines. However, Mr. Davis, in commenting upon a publication (shown to him by counsel) with reference to keeping certain types of lines on reels, testified as follows:

"A. Your Honor, it specifies here *towing* lines. Towing lines are insurance lines and will be kept on deck. The Marine Bureau requires that. The insurance requires that. But not mooring lines." (emphasis supplied).

"The Court. Q. What about handling lines?
A. The handling procedure is the same. When you use a reel ordinarily, ordinarily one reel should be there, and when you use a towing line it would have to be rolled off the reel and made ready for any towing or salvage job which it is intended for. A mooring line, as I stated before, would be stowed below deck to keep it out of the weather, and when the ship makes into port they will take it from below deck and fake it out or coil it out on the deck of the ship. That is the general practice and one that has always been considered safe practice." (Tr. 101-102).

An attempt was made by Appellant's counsel to elicit testimony from one of the witnesses that if reels were used the mooring lines would not kink. In this regard the said witness, Jose Laines, in his deposition, which was offered in evidence by Appellant (Tr. 89), testified as follows:

“Mr. Fish. As I understand it, you don't get the kinks if you use a reel, do you, if reels are used you don't have those kinks in handling the lines, do you?

A. Well, sometimes you get kinks, sometimes line lay on deck, you know, and you have to take those kinks off.

Q. I realize that, but if you use reels you don't get the kinks, is that true?

A. Oh, sometimes gets some kinks.” (Tr. 322).

We are quite satisfied, and we believe the record will bear us out, that Appellant has failed utterly to meet his burden of proving that the vessel upon which he was working was unseaworthy or that Appellee was negligent. Moreover, the absence of such reels is not shown by any evidence from which the trial Court could find or infer that the alleged injury or disability complained of was the proximate result of such alleged negligence or unseaworthiness.

II. THE ALLEGED INJURY DID NOT PROXIMATELY CAUSE OR CONTRIBUTE TO APPELLANT'S DISABILITY.

Appellant's condition was described by the United States Public Health Service Doctor at Queen's Hos-

pital in Honolulu and by the physician of the United States Marine Hospital in San Francisco as being a left hemiplegia resulting from a cerebral and generalized arteriosclerosis, together with cerebral thrombosis and encephalomalacia (Tr. 384-385). It is of some significance to note also that at neither hospital was any history of injury given by Appellant who, in fact, complained to the physician at the Marine Hospital that he had suffered a "stroke" (Tr. 384).

Dr. John Raaf, a Neuro-Surgeon of high standing in Portland, Oregon, examined Appellant on behalf of Appellee and diagnosed the disability as being a left hemiplegia resulting from a cerebral thrombosis and softening of the brain (Tr. 37). In his testimony before the District Court Dr. Raaf pointed out that the incident of the described blow on the head had nothing to do with causing or contributing to the Paralysis which developed approximately three weeks later and he explained his reasons as follows:

"A. In my opinion the incident of the blow on the head has nothing to do with his present disability.

Q. Will you elaborate for the Court and explain your opinion?

A. Following a blow on the head several things can occur, and it does not seem to me that any of them could have occurred in this particular case. A blow on the head can produce a laceration or a bruising of the brain, but if that were the case, the patient should have had some symptoms right at the time the injury occurred.

Q. Pardon me, Doctor. When you say some symptoms, what kind of symptoms do you have reference to?

A. He should have had headache, he should have had some weakness of an arm or a leg, or unconsciousness; he should not have been able to go on about his duties for the next two or three weeks, such as he did. A blow on the head can produce a condition we call subdural hematoma, but the course of his illness is not that of a subdural hematoma.

Q. A subdural hematoma is one in which there is a delayed result—in other words, the man gets a blow and then may go along for a few days or weeks and the slow hemorrhage eventually causes an unconsciousness or disability, is that it?

A. That is right. It causes a pressure in the head and the patient has severe headaches, dimming of consciousness, and a spinal fluid examination and examination of the backs of the eyes show all the signs of pressure.

Q. In this thrombosis, what part of the head and what part of the vessels of the brain is it your opinion are affected?

A. I think branches of the middle cerebral artery were affected in this man. He gives the history that the trouble began in the left hand and then gradually progressed to involve the left leg. I think the very small end branches of the artery were involved first, and the thrombus progressed back down the arterial tree to involve larger and larger branches, and finally the whole left side of the body was involved that I designate. * * *'' (Tr. 41-42).

The Doctor further explained that where there is a gradual development of paralysis, the symptoms would be such that the patient would be unable to

carry on his regular duties during the progress of the paralysis (Tr. 43). Dr. Raaf also testified that usually where a sufficient blow is received on the *left* side of the head, the hemiplegia and resulting paralysis affects the *right* side of the body; that is, the *right* leg and *right* arm (Tr. 45). As will be noted, Appellant claims to have been struck a relatively light blow on the *left* side of the head and his paralysis occurred some three weeks later, without any intervening symptoms, on the same side—the *left* arm and the *left* leg.

We need not dwell further on Dr. Raaf's clear-cut testimony, except to point out that Appellant's counsel vigorously and extensively cross-examined him, with the result that Dr. Raaf's opinion was considerably elaborated upon and strengthened.

III. THE DISTRICT COURT'S ALLOWANCE OF ONE YEAR'S MAINTENANCE WAS REASONABLE AND SUPPORTED BY THE EVIDENCE AS WAS THE COURT'S DENIAL OF ALLOWANCE FOR SO-CALLED "NURSING CARE."

Appellant complains of the Court's awarding of one year's maintenance, but the record will show no adequate proof has been offered to justify any further or additional allowance. The Marine Hospital in San Francisco discharged Appellant from further treatment on October 30, 1944 (Tr. 383), and Appellant then went home. Dr. Raaf testified that at the time of Appellant's discharge from the Marine Hospital he would conclude that the condition was practically sta-

tionary. In any event, Judge Goodman allowed maintenance for one year following Appellant's discharge from the Marine Hospital (Tr. 72). There is certainly no showing that any material improvement occurred after Appellant left the Hospital except that he regained "some little function that he did not have in his left leg and hand for a period of time of about one year" (Tr. 72).

As has been so well stated by the United States Supreme Court in the case of *Calmar Steamship Corporation v. Taylor*, 303 U. S. 523, 82 L. Ed. 993:

"We find no support in the policies which have generated the doctrine for holding that it imposes on the ship owner an indefinitely continuing obligation to furnish medical care to a seaman afflicted with an incurable disease, which manifests itself during his employment, but is not caused by it. So far as we are advised it is without support in the authorities. We can find no basis for saying that, if the disease proves to be incurable, the duty extends beyond a fair time after the voyage in which to effect such improvement in the seaman's condition as reasonably may be expected to result from nursing, care, and medical treatment. This would satisfy such demands of policy as underlie the imposition of the obligation. Beyond this we think there is no duty, at least where the illness is not caused by the seaman's service."

With regard to the claim for "nursing care" allegedly provided by Appellant's wife at home, we believe there was no evidence upon which the Court

could properly find that Appellant was entitled to such allowance. If Appellant's condition was such that he required nursing care, he should have returned to the U. S. Marine Hospital where such nursing care was certainly available to him without expense to anyone.

As further stated in the *Calmar* case, *supra*, 303 U. S. at page 531:

“* * * Courts take cognizance of the marine hospital service where seamen may be treated at minimum expense, in some cases without expense, and they limit recovery to the expense of such maintenance and cure as is not at the disposal of the seaman through recourse to that service.”

There has certainly been no showing made that Marine Hospital and nursing care were “not at the disposal of the seaman through recourse to that service.”

IV. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR CONTINUANCE AT THE CONCLUSION OF THE CASE.

Appellant complains that the trial judge erred in not granting his motion for continuance on the ground of claimed surprise simply because the testimony of Appellee's witness, Dr. Raaf, “was allegedly different from that indicated in his report, his reasons, and so on.” Counsel argued that, since he (counsel) is “not a medical man”, he wanted to seek out another medical witness and submit to him a transcript of the testimony of Dr. Raaf (Tr. 109). We believe that

Judge Goodman's reasons for denying this continuance are so well stated that we can do no better than to quote him:

"The Court. That ground addressed to the Court by an experienced practitioner is completely unpersuasive. You pressed this case for trial time after time, asking me for an early date, and I see nothing by way of surprise. There is nothing more in this case than the usual type of conflict in evidence that happens in a case. The time to investigate a case is, of course, before trial, and not afterwards. If your theory of asking for a further hearing in the matter were followed, it would mean that in every case every lawyer who is dissatisfied with the fact that the witnesses for the other side did not break down and confess that he was right would have the opportunity to ask for a further opportunity to investigate the case and no litigation would ever terminate." (Tr. 109-110.)

There was further argument by counsel for Appellant to the effect that in his testimony Dr. Raaf had "carried himself further than any doctor can go," to which the Court appropriately answered: "What you are talking about are matters that go to the weight of the testimony; that is for the Court to decide." (Tr. 110.)

V. THE AUTHORITIES CITED BY APPELLANT ARE
DISTINGUISHABLE AND NOT IN POINT.

Appellant cites *United States v. One Device, Etc.*, 160 Fed. (2d) 194, apparently as authority for his claim that the Court's findings of fact were not

proper. That case merely holds that a finding of the trial Court is binding upon the Appellate Court if sustained by the record, but if such finding is "clearly erroneous" or is based upon a misapplication of law, it is not binding upon the Appellate Court, and that the trial Court's finding that "Libelant has not offered any substantial evidence upon which to entitle it to judgment as prayed" was clearly erroneous. Accordingly, such finding was set aside. This is merely a statement of elementary law.

The same may be said with regard to the other cases cited by Appellant, as for example, *United States v. Forness*, 129 Fed. (2d) 928, and *The Arizona v. Anelich*, 298 U. S. 110, 80 L. Ed. 1075. In the latter case it was held, among other rulings, that a seaman assumes the risks normally incident to his calling, but not that of negligent failure to provide a seaworthy ship and safe appliances. The seaman in that case was fatally injured when his leg became entangled in the purse line of a fishing net. With regard to whether there was evidence of negligence, the Court held as follows:

"* * * it suffices to say that, although the testimony was conflicting, there was evidence from which the jury could have found that the clutch controlled by the lever at the winch was negligently allowed to remain in a defective condition; that because of the defect it would not remain engaged and the winch drums would not turn continuously unless the lever controlling the clutch was held in a position by the brace; that the use of the brace to prevent the worn clutch from slipping or disengaging, rendered the winch defec-

tive and unsafe to those required to work in its vicinity and that the use of the brace, and the consequent delay in stopping the winch from the engine room, when the alarm was given, was the proximate cause of the injury and death." (At p. 117.)

Surely the facts of the case at bar are not in any wise comparable to the facts in *The Arizona v. Anelich*, supra.

The case of *United States v. Forness, et al.*, supra, involved an appeal to the United States Circuit Court of Appeals, Second Circuit, under the Federal Rules of Civil Procedure, arising out of a civil action to cancel a lease of land because of default in the payment of rent. The case was heard by the District Court without a jury. With regard to the Court's findings, the Circuit Court pointed out the requirement that such findings be made after careful consideration and with due care. The Court held that "the findings proposed by the defendants were mechanically adopted, with the consequence that some of the findings made by the District Court are not supported by the evidence and not substantially in accord with the opinion." (At page 942.) The Court further pointed out that the Appellant must overcome the heavy burden of showing that the findings of fact are "clearly erroneous." In further elaborating on the basis for requiring the trial judge to carefully consider the evidence and make proper findings, the Court stated (at page 943) that such responsibility "is not a light responsibility since, unless his findings are 'clearly erroneous', no upper

court may disturb them." It is respectfully submitted that there is no showing whatever in this case that Judge Goodman did not carefully consider the entire evidence, nor has it been shown that the findings of fact were not in accord with a preponderance of the evidence.

In *Kreste v. United States*, 158 Fed. (2d) 575, which Appellant has cited in support of his proposition that the question of whether or not an employer of a seaman has been negligent is "a question of law" (page 4 of Appellant's brief), it appears that a long-shoreman was injured by reason of slipping on an oily deck. The United States Circuit Court held that "the judge's opinion and findings state facts which justify his legal conclusion as to Appellant's negligence. The evidence amply supports the judge on that issue of fact. It should be obvious by now that we will not consider Appellant's contentions which relate to the credibility of witnesses who testified in open court." (At page 577.) We do not see that this case is any authority for reversal of the District Court's judgment in the case at bar.

There are a number of other cases cited by Appellant which are likewise not in point and which involve legal principles which we do not dispute. It would therefore serve no useful purpose to review each of such authorities.

CONCLUSION.

It is respectfully submitted that on the facts and on the law there has been no showing of any negligence on the part of Appellee or any unseaworthiness in the condition of its vessel, which proximately caused or contributed to the occurrence of Appellant's alleged injury or disability. In conclusion we desire to emphasize the following points:

1. There was no competent proof of any negligence on the part of Appellee or any unseaworthiness of the vessel proximately causing or contributing to the alleged injury or disability and the District Court therefore did not err in denying recovery for damages. A preponderance of the evidence established that:

(a) The alleged injury, if it did occur, was of such minor significance that it was not disabling;

(b) That the Appellant's disability, which had its inception at Honolulu some three weeks after the claimed accident, was due to cerebral thrombosis and softening of the brain and was not caused or precipitated by the alleged injury;

(c) The only acceptable evidence in the record on the question of whether the vessel was unseaworthy and whether Appellee was negligent because of the absence of reels and mooring cables, was that such reels were not required nor customarily or otherwise maintained on Liberty vessels, or even on the larger Victory ships, and that the manner in which the work was being done at the time of the alleged mishap was the

usual and customary method and was considered safe practice; and

(d) In any event, Appellant failed to prove that the alleged injury was proximately caused or contributed to by such alleged unseaworthiness or negligence.

2. There is no showing of error on the part of the District Court in finding that Appellant was entitled to maintenance for the reasonable period of one year following his release from the Marine Hospital in San Francisco. Appellant failed to offer any competent evidence showing that the reasonable period of maintenance should exceed this allowance. On the other hand, testimony was offered on behalf of Appellee by Dr. John Raaf, a noted Neuro-Surgeon of Portland, Oregon, to the effect that Appellant's condition at the time of his release from the Marine Hospital in San Francisco was substantially stationary. The trial Court allowed maintenance for one year after this date, which would appear to be fair and reasonable under the circumstances.

3. The District Court's denial of recovery for so-called "nursing care" which was allegedly rendered by Appellant's wife at home following Appellant's discharge from the Marine Hospital in San Francisco was not erroneous, but in fact was fully supported by the evidence. There was no proper showing by any competent proof that Appellant was in need of nursing care or that such care, if needed, was not available at a United States Marine Hospital.

4. There was no error in the District Court's denial of Appellant's request for continuance of the trial on the grounds of alleged "surprise of the testimony" of Dr. Raaf, who testified on behalf of Appellee. Appellant's counsel had full opportunity to, and did extensively cross-examine Dr. Raaf at the trial. The mere fact that a witness cannot be broken down by cross-examination or that such witness maintains a view contrary to that of opposing counsel is surely no basis for counsel in any case to expect the trial Court to grant a continuance; indeed, it would be highly improper for the Court to do so.

Appellee respectfully submits that the decree of the District Court, which is in all particulars fully supported by the evidence, should be affirmed.

Dated, San Francisco, California,
February 10, 1948.

FRANK J. HENNESSY,
United States Attorney,
Proctor for United States of America.

JOHN H. BLACK,
EDWARD R. KAY,
HENRY W. SCHALDACH,
Of Counsel for United States of America.

No. 11794

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOSHUA HENDY CORPORATION, a corporation,
Appellant,

vs.

LOUISE E. MILLS, Administratrix of the Estate of
Thomas C. Mills, Deceased,
Appellee.

LOUISE E. MILLS, Administratrix of the Estate of
Thomas C. Mills, Deceased,
Appellant,

vs.

JOSHUA HENDY CORPORATION, a corporation,
Appellee.

TRANSCRIPT OF RECORD

Upon Appeals From the District Court of the United States
for the Southern District of California
Central Division

No. 11794

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JOSHUA HENDY CORPORATION, a corporation,
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vs.

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TRANSCRIPT OF RECORD

Upon Appeals From the District Court of the United States
for the Southern District of California
Central Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

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WEINSTEIN & BERTRAM

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1151 South Broadway

Los Angeles 15, California. [1*]

In the District Court of the United States in and for
Southern District of California

Central Division

No. 5870-M

LOUISE E. MILLS, Administratrix of the Estate of
Thomas C. Mills, Deceased,

Plaintiff,

vs.

CALIFORNIA SHIPBUILDING CORPORATION,
a corporation,

Defendant.

COMPLAINT FOR WAGES AND LIQUIDATED
DAMAGES DUE UNDER THE FAIR LABOR
STANDARDS ACT OF 1938

Plaintiff complains and alleges:

I.

Plaintiff brings this action pursuant to Sec. 16(b) of the Fair Labor Standards Act of 1938 (Public No. 718, 75th Cong., Ch. 676, 52 Stat. 1060-1069 (1938), 29 U. S. C., Sec. 201-219), hereinafter referred to as the Act to recover overtime wages, liquidated damages and attorneys' fees.

II.

Jurisdiction of this action is conferred upon the Court by Sec. 16(b) of the Act and by Sec. 24(8) of the Judicial Code (28 U. S. C. Sec. 41(8).)

III.

Thomas C. Mills died August 28, 1945, and subsequently [2] on May 16, 1946, plaintiff Louise E. Mills

was duly and regularly appointed by the Superior Court of the State of California, in and for the County of Los Angeles, as Administratrix of the Estate of said Thomas C. Mills in proceeding numbered LBP 15807, records and files of said Court, and ever since that date has been and now is the Administratrix of said estate.

IV.

Defendant is a corporation organized under the laws of the State of California, authorized to do business therein and having its principal place of business in the County of Los Angeles, State of California, within the jurisdiction of this Court.

V.

At all times mentioned herein, defendant was and now is engaged at its said place of business in the County of Los Angeles, State of California, within the jurisdiction of this Court, in interstate commerce and in the production of goods, to wit, ships, for interstate commerce within the meaning of the Act.

VI.

Within three years last past, the defendant employed Thomas C. Mills, now deceased, at its said place of business as a Stationary Engineer, in which capacity said Thomas C. Mills was employed by the defendant in interstate commerce and in the production of goods, to wit, ships, for interstate commerce, within the meaning of the Act.

VII.

From the week ending October 6, 1943, until March, 1945, said Thomas C. Mills was employed by defendant at an hourly rate of \$1.53, and from March, 1945, until

his death August 28, 1945, was employed at an hourly rate of \$1.74. In substantially all of said weeks said Thomas C. Mills was credited with having worked forty-eight (48) hours, for forty (40) hours of which he was paid at straight time and for eight (8) hours of which he was paid at time [3] and one-half. In addition to said forty-eight hours for which he was credited and paid, he worked three (3) hours each week for which he received no credit or compensation.

VIII.

There is now due, owing and unpaid from the defendant to said Thomas C. Mills, Deceased, a sum equal to one and one-half times the regular rate at which said Thomas C. Mills was employed times three hours for each week of his employment by defendant, or the approximate sum of Seven Hundred (\$700), plus an equal amount as liquidated damages.

IX.

Sec. 16(b) of the Act provides that the Court in this action shall, in addition to any judgment awarded to the plaintiff, allow a reasonable attorney's fee to be paid by the defendant.

Wherefore, Plaintiff prays for judgment in the sum of \$700.00, plus an equal amount as liquidated damages, plus a reasonable attorneys' fee, for costs of suit and all proper relief.

WEINSTEIN & BERTRAM

By Perry Bertram

Attorneys for Plaintiff [4]

[Vertified.]

[Endorsed]: Filed Oct. 17, 1946. Edmund L. Smith, Clerk. [5]

[Title of District Court and Cause]

ANSWER TO COMPLAINT

Now comes the defendant, California Shipbuilding Corporation, and answers the complaint herein as follows:

I.

Answering the allegations contained in paragraph IV of said complaint, said defendant alleges that California Shipbuilding Corporation is a corporation organized and existing under the laws of the State of Delaware, and that said defendant is authorized to do business in California and has its principal place of business in the County of Los Angeles, State of California. Except as herein expressly admitted, defendant denies each and every allegation contained in paragraph IV of said complaint.

II.

Answering the allegations contained in paragraph V of said complaint, said defendant alleges that from May 4, 1943, until October 27, 1945, said defendant was engaged in the production of [6] ships under contracts with the United States Maritime Commission at the Commission's shipyard at Terminal Island, California. Except as herein expressly admitted, defendant denies each and every allegation contained in paragraph V of said complaint.

III.

Answering the allegations contained in paragraph VI of said complaint, said defendant alleges that Thomas C. Mills was employed by defendant from October 17, 1943, to August 28, 1945, in work necessary to the production of said ships being constructed under said contracts with the United States Maritime Commission. Except as herein expressly admitted, defendant denies each and every allegation contained in paragraph VI of said complaint.

IV.

Answering the allegations contained in paragraph VII of said complaint, defendant alleges that Thomas C. Mills was employed by defendant for the periods, rates and in the classifications as follows:

<u>Period</u>	<u>Rate</u>	<u>Classification</u>
October 17, 1943 to April 17, 1944	\$1.33 per hour	Operating Engineer
April 17, 1944 to November 13, 1944	\$1.53 per hour	Operating Engineer
November 13, 1944 to August 28, 1945	\$1.74 per hour	Operating Engineer

That Thomas C. Mills was fully paid for all hours in each workweek during which he worked in excess of forty (40) hours, and that any and all payments were made to him as required by the provisions of the Fair Labor Standards Act. Except as herein expressly admitted, defendant denies each and every allegation of said paragraph. [7]

V.

Answering the allegations contained in paragraph VIII of said complaint, defendant denies the allegations contained in said paragraph VIII of said complaint.

Wherefore, defendant prays that plaintiff take nothing by her complaint and that defendant go hence with its costs.

THELEN, MARRIN, JOHNSON & BRIDGES

By Robert H. Sanders

Attorneys for Defendant [8]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Nov. 21, 1946. Edmund L. Smith, Clerk. [9]

[Title of District Court and Cause]

PRE-TRIAL STIPULATION OF FACTS AND
STATEMENT OF ISSUES

FACTS

It is hereby stipulated between the plaintiff and defendant, through their respective counsel:

I.

At all times during the employment by defendant of plaintiff's decedent, defendant produced ships under contracts with the United States Maritime Commission. Upon the completion of each ship, it was delivered by defendant to the United States Maritime Commission at its shipyard at Terminal Island, County of Los Angeles, State of California.

Following the delivery of each ship, it was sent by the United States Maritime Commission from the State of California to points outside of the State of California. [10]

II.

During his employment by the defendant, plaintiff's decedent was employed at the following rates of pay:

From October 17, 1943, to and including April 23, 1944, \$1.33 per hour;

From November 14, 1944, to August 28, 1945, \$1.748 per hour;

For the period from April 24, 1944, to November 13, 1944, plaintiff and defendant each have different contentions as to what the hourly rate of pay was. These contentions are set forth in their respective pre-trial statement.

III.

During his employment by the defendant, plaintiff's decedent worked the full work day for six days each week, except during the following weeks:

Week ending December 25, 1943,

Week ending February 6, 1944,

Week ending March 17, 1945,

Week ending March 25, 1945,

Week ending April 1, 1945,

Week ending April 8, 1945,

Week ending August 18, 1945,

Week ending August 25, 1945,

Week ending September 2, 1945.

IV.

During his employment by the defendant, plaintiff's decedent worked on the day shift from October 17, 1943, to April 23, 1944, and on the graveyard shift from April 24, 1944, until August 28, 1945. During the period in which plaintiff's decedent was on the day shift, his scheduled shift was from 8:00 A. M. to 4:30 P. M., with one-half hour off for lunch. While on the graveyard shift, his scheduled shift was from 12:30 A. M. to 8:00 A. M., with one-half hour off for lunch. [11]

ISSUES

It is agreed by and between plaintiff and defendant, that the following are the issues to be determined in this action.

I.

Was plaintiff's decedent employed by defendant in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938?

II.

Did plaintiff's decedent work during his scheduled lunch periods? If so, on how many occasions?

III.

If plaintiff's decedent did work during his lunch periods, was he paid therefor during his employment from April 24, 1944, to November 13, 1944?

Dated: May 1, 1947.

WEINSTEIN & BERTRAM

By Perry Bertram

Attorneys for Plaintiff

THELEN, MARRIN, JOHNSON & BRIDGES

SAMUEL S. GILL, ROBERT H. SANDERS

By Robert H. Sanders

Attorneys for Defendant

[Endorsed]: Filed May 1, 1947. Edmund L. Smith,
Clerk. [12]

In the District Court of the United States in and for the
Southern District of California
Central Division

Civil Action File No. 4626-W

OLIVER P. ADAMSON, et al.,

Plaintiffs,

vs.

CALIFORNIA SHIPBUILDING CORPORATION,
a corporation,

Defendant.

Civil Action File No. 4747-W

JOSEPH D. KOURY,

Plaintiff,

vs.

CALIFORNIA SHIPBUILDING CORPORATION,
a corporation,

Defendant.

Civil Action File No. 4834-WM

CLEM H. ABBOTT, et al.,

Plaintiffs,

vs.

CALIFORNIA SHIPBUILDING CORPORATION,
a corporation,

Defendant.

Civil Action File No. 5246-M

CHARLES E. BAKER, et al.,

Plaintiffs,

vs.

CALIFORNIA SHIPBUILDING CORPORATION,
a corporation,

Defendant. [13]

Civil Action File No. 5639-W

JAMES M. CLARK, et al.,

Plaintiffs,

vs.

CALIFORNIA SHIPBUILDING CORPORATION,
a corporation,

Defendant.

Civil Action File No. 5863-W

WILLIAM A. POLLOCK,

Plaintiff,

vs.

CALIFORNIA SHIPBUILDING CORPORATION,
a corporation,

Defendant.

Civil Action File No. 5870-M

LOUISE E. MILLS, Administratrix of the Estate of
THOMAS C. MILLS, Deceased,

Plaintiff,

vs.

CALIFORNIA SHIPBUILDING CORPORATION,
a corporation,

Defendant.

Civil Action File No. 5875-B

M. E. ELLIOTT, et al.,

Plaintiffs,

vs.

CALIFORNIA SHIPBUILDING CORPORATION,
a corporation,

Defendant.

Civil Action File No. 5931-OC

FELIX A. TULLY, et al.,

Plaintiffs,

vs.

CALIFORNIA SHIPBUILDING CORPORATION,
a corporation,

Defendant [14]

Civil Action File No. 6113-BH

JOSEPH L. DWIRE, et al.,

Plaintiffs,

vs.

CALIFORNIA SHIPBUILDING CORPORATION,
a corporation,

Defendant.

Civil Action File No. 6176-Y

J. H. DEVINE, et al.,

Plaintiffs,

vs.

CALIFORNIA SHIPBUILDING CORPORATION,
a corporation,

Defendant.

Civil Action File No. 6286-Y

RAPHAEL J. CHERVENITSKI, et al.,

Plaintiffs,

vs.

CALIFORNIA SHIPBUILDING CORPORATION,
a corporation,Defendant.

Civil Action File No. 6340-PH

JOSEPH F. QUINN, et al.,

Plaintiffs,

vs.

CALIFORNIA SHIPBUILDING CORPORATION,
a corporation,

Defendant.

STIPULATION AND ORDER CHANGING NAME
OF DEFENDANT

It is stipulated by and between the parties, through their respective counsel, in each of the above-entitled actions, that all pleadings heretofore filed by the parties hereto, in each of said actions, may be deemed amended to change the name of said defendant from California Shipbuilding [15] Corporation to Joshua Hendy Corporation.

Dated: May 16, 1947.

THELEN, MARRIN, JOHNSON & BRIDGES
ROBERT H. SANDERS

Attorneys for Defendant

WEINSTEIN & BERTRAM

By Perry Bertram

Attorneys for Plaintiffs in Cases No. 4747-W, 5870-M

PERRY BERTRAM and MOHR & BORSTEIN

By Perry Bertram

Attorneys for Plaintiffs in Case No. 6176-Y

WEINSTEIN & BERTRAM

MOHR & BORSTEIN

By Perry Bertram

Attorneys for Plaintiffs in Case No. 5875-B

MEYER LITENBERG, MOHR & BORSTEIN
and PERRY BERTRAM

By Perry Bertram

Attorneys for Plaintiffs in Case No. 5931-OC

DAVID SOKOL

Attorney for Plaintiffs in Cases No. 4626-W,
5639-W, 6286-Y

DAVID SOKOL and CLETUS J. HANIFIN

By David Sokol

Attorneys for Plaintiffs in Cases No. 4834-WM,
5246-M, 6113-BH

WARNER, PERACCA & MAGANA and
LANE & LANE

By James O. Warner

Attorneys for Plaintiff in Case No. 5863-W

EDWARD FELDMAN and JAMES WOLF

By Edward Feldman

Attorneys for Plaintiffs in Case No. 6340-PH

It Is So Ordered; It Is Further Ordered that the Clerk of this Court make the necessary changes of record in each of the above-entitled actions and that two copies of this Stipulation and Order be filed by the Clerk in each of said actions.

Dated this 16th day of May, 1947.

PAUL J. McCORMICK

United States District Court Judge

[Endorsed]: Filed May 16, 1947. Edmund L. Smith,
Clerk. [16]

In the District Court of the United States in and for the
Southern District of California

Central Division

Civil Action File No. 5870-M

LOUISE E. MILLS, Administratrix of the Estate of
Thomas C. Mills, Deceased,

Plaintiff,

vs.

JOSHUA HENDY CORPORATION, a corporation,
Defendant.

FIRST AMENDED ANSWER TO COMPLAINT

Now comes the defendant, Joshua Hendy Corporation,
and answers the complaint herein as follows:

I.

Answering the allegations contained in paragraph IV of said complaint, said defendant alleges that Joshua Hendy Corporation is a corporation organized and existing under the laws of the State of Delaware, and that said defendant is authorized to do business in California and has its principal place of business in the County of Los Angeles, State of California. Except as herein expressly admitted, defendant denies each and every allegation contained in paragraph IV of said complaint.

II.

Answering the allegations contained in paragraph V of said complaint, said defendant alleges that from May 4, 1943, until October 27, 1945, said defendant was engaged in the production of [22] ships under contracts with the United States Maritime Commission at the Commission's

shipyard at Terminal Island, California. Except as herein expressly admitted, defendant denies each and every allegation contained in paragraph V of said complaint.

III.

Answering the allegations contained in paragraph VI of said complaint, said defendant alleges that Thomas C. Mills was employed by defendant from October 17, 1943, to August 28, 1945, in work necessary to the production of said ships being constructed under said contracts with the United States Maritime Commission. Except as herein expressly admitted, defendant denies each and every allegation contained in paragraph VI of said complaint.

IV.

Answering the allegations contained in paragraph VII of said complaint, defendant alleges that Thomas C. Mills was employed by defendant for the periods, rates and in the classifications as follows:

<u>Period</u>	<u>Rate</u>	<u>Classification</u>
October 17, 1943 to		
April 17, 1944	\$1.33 per hour	Operating Engineer
April 17, 1944 to		
November 13, 1944	\$1.53 per hour	Operating Engineer
November 13, 1944 to		
August 28, 1945	\$1.74 per hour	Operating Engineer

That Thomas C. Mills was fully paid for all hours in each workweek during which he worked in excess of forty (40) hours, and that any and all payments were

made to him as required by the provisions of the Fair Labor Standards Act. Except as herein expressly admitted, defendant denies each and every allegation of said paragraph. [23]

V.

Answering the allegations contained in paragraph VIII of said complaint, defendant denies the allegations contained in said paragraph VIII of said complaint.

And for a Further, Separate and Affirmative Defense, defendant alleges that the failure, if any, by defendant to fully comply with the Fair Labor Standards Act of 1938 was in good faith, and that defendant had reasonable grounds for believing that its act or omission in not paying deceased for the half-hour lunch period was not a violation of the Fair Labor Standards Act of 1938.

Wherefore, defendant prays that plaintiff take nothing by her complaint and that defendant go hence with its costs.

THELEN, MARRIN, JOHNSON & BRIDGES
ROBERT H. SANDERS

Attorneys for Defendant [24]

[Verified.]

[Endorsed]: Filed Jun. 12, 1947. Edmund L. Smith,
Clerk. [25]

[Title of District Court and Cause]

MEMORANDUM OF DECISION ON THE MERITS
AND ORDER FOR JUDGMENT

We have given deliberate consideration to the applicability of Section 2(d) of the Portal to Portal Act of 1947 to this action and to the evidence in the record before us in this action.

We are of the opinion that under the concrete situation before us in this action, the provisions of the amendatory act effective May 14, 1947 are inapplicable.

We find that plaintiff's decedent under unrepealed and effective terms of the Fair Labor Standards Act was actually hired to, and did, perform productive services with right to compensation during the so called "lunch or eating periods." There was no real lunch period allocated. Services of the same type and continuity were rendered at all times.

Findings of Fact, Conclusions of Law and Judgment for the plaintiff for \$645.19,* unpaid overtime wages without liquidated damages and attorney's fees of \$75.00 and costs are ordered. [26]

Plaintiff's attorney will prepare and serve Findings of Fact, Conclusions of Law and Judgment accordingly within 5 days from notice of this ruling.

*\$1.33 x $1\frac{1}{2}$ x 3 x 25—\$149.63

\$1.748 x $1\frac{1}{2}$ x 3 x 63— 495.56

\$645.19

Dated at Los Angeles, California, this 3rd day of September, 1947.

PAUL J. McCORMICK

United States District Judge

[Endorsed]: Filed Sep. 3, 1947. Edmund L. Smith, Clerk. [27]

[Title of District Court and Cause]

OBJECTIONS TO PROPOSED FINDINGS OF
FACT AND CONCLUSIONS OF LAW

(See notations on 2nd page)

The defendant, Joshua Hendy Corporation, objects to the proposed findings of fact and conclusions of law heretofore served upon it as follows:

1. Defendant objects to paragraph 8 of the said findings of fact in that said paragraph implies that Thomas C. Mills, deceased, did not at any time during his shift eat his lunch. It is submitted that the evidence clearly showed that he did take his lunch to work with him daily and ate it during his shift.

2. Defendant objects that the proposed findings of fact and conclusions of law are insufficient to support the judgment both as to defendant's liability and the court's jurisdiction of the cause. There must be a finding of fact and a conclusion of law as to whether the alleged lunch period activity, during the period in issue, was compensable by either an express provision of a written or non-written contract or by a custom or practice. For Section 2 [28] of the Portal-to-Portal Act of 1947 expressly provides that if the activity is not so compensable, the employer shall not be subject to liability, and further, that if not so compensable this court has no jurisdiction of the action.

Dated: September 10, 1947.

Respectfully submitted,

THELEN, MARRIN, JOHNSON & BRIDGES

By Robert H. Sanders

Attorneys for Defendant

Sept. 11, 1947

The foregoing were before the Judge this day were considered, not adopted, and appropriate Findings of Fact, Conclusions of Law and Judgment in line with Memorandum of Decision of Sept. 3, 1947, were signed and filed this Sept. 11, 1947.

PAUL J. McCORMICK

Judge [29]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Sep. 11, 1947. Edmund L. Smith,
Clerk. [30]

[Title of District Court and Cause]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

This cause having come on regularly for trial before the above entitled Court, Hon. Paul J. McCormick, Judge Presiding, on May 8, 1947, the plaintiff being present in person and by her counsel Perry Bertram of Weinstein & Bertram, and the defendant being represented by its counsel Samuel S. Gill and Robert H. Sanders of Thelen, Marrin, Johnson & Bridges, Samuel S. Gill and Robert H. Sanders, and both parties having introduced evidence, both oral and documentary, having entered into various stipulations of facts, having submitted written briefs, and having been fully heard, and the cause having been submitted,

The Court, being fully advised, makes the following
FINDINGS OF FACT

1. This action was brought by the plaintiff to recover from the defendant unpaid overtime wages and liquidated damages as [31] provided by the Fair Labor Standards

Act of 1938 (Public No. 718, 75th Cong., Ch. 676, 52 Stat. 1060-1069 (1938), 29 U. S. C., Sec. 201-219) hereinafter referred to as the Act.

2. At all times mentioned in these Findings, defendant was a corporation duly organized under the laws of the State of Delaware, authorized to do business in California, and having and operating a shipyard located at Wilmington, California, within the territorial jurisdiction of this Court, where it was engaged in producing ships. All of the ships produced by the defendant were, upon their completion, delivered at said shipyard to the United States Maritime Commission, which thereafter transported, delivered or took said ships from the State of California to points outside the State of California.

3. Thomas C. Mills died prior to the commencement of this action, and thereafter, before commencing this action, the plaintiff was duly and regularly appointed by the Superior Court of the State of California in and for the County of Los Angeles, as the Administratrix of the Estate of said Thomas C. Mills, and has at all times since said appointment continued to act as said Administratrix.

4. From prior to October 17, 1943, until August 28, 1945, said Thomas C. Mills was employed by the defendant at and about its said shipyard in Wilmington, California, in the capacity of engineer, in which capacity said Thomas C. Mills was employed by the defendant in the production of said ships and in processes and occupations necessary to said production of ships.

5. From October 17, 1943, to and including April 23, 1944, said Thomas C. Mills was employed by the defendant at an hourly rate of \$1.33. From April 24, 1944, to and including August 28, 1945, said Thomas C. Mills was employed by the defendant at an hourly rate of \$1.748.

6. From October 17, 1943, to and including April 23, 1944, said Thomas C. Mills worked in excess of forty hours in each of twenty-five (25) workweeks; from April 24, 1944, to and including August 28, 1945, said Thomas C. Mills worked in excess of forty [32] hours in each of sixty-three (63) workweeks.

7. During the entire period of his employment by the defendant, including the workweeks mentioned in Finding 6, the wages paid to Thomas C. Mills compensated for all of the hours between his starting time at the beginning of his shift and his quitting time at the end of his shift, except for one-half hour each day during which he was scheduled to take his lunch period, for which one-half hour each day he received no compensation.

8. In each of the workweeks mentioned in Finding 6, Thomas C. Mills was required by the defendant to, and did, spend his entire shift, including the said one-half hour lunch periods at his place of duty in the performance of the duties for which he was hired by the defendant, and was not excused or relieved therefrom for the purpose of taking lunch. Each of said one-half hour lunch periods constituted hours worked by Thomas C. Mills, totaling three hours in each week, for which he received no compensation, which hours were in excess of forty hours in each of the workweeks mentioned in Finding 6.

9. The amount of overtime compensation to which Thomas C. Mills was entitled and which defendant was required to pay by the terms of the Fair Labor Standards Act of 1938, for the said overtime hours was and is the sum of \$149.63 for the period from October 17, 1943, to and including April 23, 1944, plus the sum of \$495.56

for the period from April 24, 1944, to and including August 28, 1945, or a total of \$645.19.

10. The omission on the part of the defendant to pay the said overtime wages due Thomas C. Mills was in good faith and upon reasonable grounds for believing that said omission was not a violation of the Act.

11. Plaintiff's attorneys have rendered legal services herein for which plaintiff is entitled to recover of and from the defendant the sum of \$75.00, as and for attorneys' fees. [33]

From the foregoing Findings of Fact, the Court draws the following

CONCLUSIONS OF LAW

1. Jurisdiction of this action is conferred upon the Court by the Act and by Section 24(8) of the Judicial Code (28 U. S. C. §41(8).)

2. From October 17, 1943, to and including August 28, 1945, the period involved in this action, Thomas C. Mills was employed by the defendant in the production of goods for interstate commerce and in processes and occupations necessary to such production, within the meaning of the Act.

3. Plaintiff is entitled to bring and prosecute this action as the duly and regularly appointed, qualified and acting Administratrix of the Estate of Thomas C. Mills, deceased.

4. The activity engaged in by Thomas C. Mills during each of his one-half hour lunch periods for which he received no compensation was a compensable activity within the meaning of the Act, as amended by the Portal-to-Portal Act of 1947 (Public Law 49, 80th Cong., Ch. 52).

5. For the period from October 17, 1943, to and including April 23, 1944, plaintiff is entitled to recover of the defendant the sum of \$149.63, as and for unpaid, overtime wages.

6. For the period from April 23, 1944, to and including August 28, 1945, plaintiff is entitled to recover of the defendant the sum of \$495.56, as and for unpaid overtime wages.

7. The plaintiff is not entitled to recover any additional sums as or for liquidated damages.

8. Plaintiff is entitled to recover of the defendant the sum of \$75.00 as and for attorneys' fee for legal services rendered herein.

9. Plaintiff is further entitled to recover her costs of suit.

September 11th, 1947.

PAUL J. McCORMICK

Judge [34]

The foregoing Findings of Fact and Conclusions of Law are approved as to form. September , 1947. Thelen, Marrin, Johnson & Bridges and Samuel S. Gill and Robert H. Sanders, by, Attorneys for Defendant. [35]

Received copy of the within Findings, etc., this 8th day of Sept. 8, 1947. By Robert H. Sanders, Attorneys for Defendant.

[Endorsed]: Filed Sep. 11, 1947. Edmund L. Smith, Clerk. [36]

In the District Court of the United States in and for the
Southern District of California

Central Division

No. 5870-M

LOUISE E. MILLS, Administratrix of the Estate of
Thomas C. Mills, Deceased,

Plaintiff,

vs.

JOSHUA HENDY CORPORATION, a corporation,
Defendant.

JUDGMENT

This cause having come on regularly for trial before the above entitled Court, Hon. Paul J. McCormick, Judge Presiding, on May 8, 1947, the Plaintiff being present in person and by her counsel Perry Bertram of Weinstein & Bertram, and the defendant being represented by its counsel Samuel S. Gill and Robert H. Sanders of Thelen, Marrin, Johnson & Bridges and Samuel S. Gill and Robert H. Sanders, and both parties having introduced evidence, both oral and documentary, having entered into various stipulations of facts, having submitted briefs, and having been fully heard, and the cause having been submitted,

The Court, having made its Findings of Fact and drawn its Conclusions of Law, orders Judgment as follows:

It is ordered, adjudged and decreed that Plaintiff have and recover of the defendant the sum of \$645.19 as over-time wages, the further sum of \$75.00 as and for attorneys' fees, and her costs of [37] suit, taxed in the sum of \$39.00.

September 11th, 1947.

PAUL J. McCORMICK

Judge

Approved as to form September 8th, 1947: Thelen, Marrin, Johnson & Bridges, Samuel S. Gill, and Robert H. Sanders, by Robert H. Sanders, Attorneys for Defendant.

Judgment entered Sep. 11, 1947. Docketed Sep. 11, 1947. C. O. Book 45, page 421. Edmund L. Smith, Clerk; by E. M. Enstrom, Jr., Deputy.

[Endorsed]: Filed Sep. 11, 1947. Edmund L. Smith, Clerk. [38]

[Title of District Court and Cause]

NOTICE OF APPEAL

Notice is hereby given that Joshua Hendy Corporation, defendant in the above-named action, appeals to the Circuit Court of Appeals for the Ninth Circuit the Final Judgment entered in this Court on September 11, 1947, in Civil Order Book No. 45, page 421, in the above-entitled action.

Dated: October 3, 1947.

THELEN, MARRIN, JOHNSON & BRIDGES

By Robert H. Sanders

Attorneys for Defendant

[Endorsed]: Filed & mld. copy to Weinstein & Bertram, attys. for plf., Oct. 3, 1947. Edmund L. Smith, Clerk. [39]

[Title of District Court and Cause]

NOTICE OF CROSS APPEAL

Notice is hereby given that Louise E. Mills, plaintiff in the above titled action, appeals to the Circuit Court of Appeals for the Ninth Circuit from

I. That portion of the Final Judgment entered in this Court on September 11, 1947, in Civil Order Book No. 45, page 421 which denied to the plaintiff recovery for liquidated damages on account of the defendant's failure to pay wages when due.

II. That portion of the same Final Judgment which fixed the amount of attorney's fees allowed to plaintiff at the sum of \$75.00.

Dated: November 6, 1947.

MOHR & BORSTEIN, and
PERRY BERTRAM
By Perry Bertram

[Endorsed]: Filed & copy mld. to appellant, Nov. 10, 1947. Edmund L. Smith, Clerk. [42]

[Title of District Court and Cause]

EXTENSION OF TIME WITHIN WHICH TO FILE
RECORD ON APPEAL WITH APPELLATE
COURT

It is requested that the time within which to file the record on appeal with the Circuit Court of Appeals, Ninth Circuit, be extended to November 26, 1947. This request is made because there has been some delay in getting the necessary papers prepared for the record on appeal.

Dated: November 12, 1947.

THELEN, MARRIN, JOHNSON & BRIDGES
ROBERT H. SANDERS

Attorneys for Defendant and Appellant

It is ordered that the time within which the record on appeal may be filed with the Circuit Court of Appeals, Ninth Circuit, in the above entitled action is extended to and including November 26, 1947.

Dated: November 12th, 1947.

PAUL J. McCORMICK
U. S. District Court Judge

[Endorsed]: Filed Nov. 12, 1947. Edmund L. Smith, Clerk. [44]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages, numbered from 1 to 45, inclusive, contain full, true and correct copies of Complaint for Wages and Liquidated Damages Due Under the Fair Labor Standards Act of 1938; Answer to Complaint; Pre-Trial Stipulation of Facts and Statement of Issues; Stipulation and Order Changing Name of Defendant; Motion to Amend Answer to Complaint; First Amended Answer to Complaint; Memorandum of Decision on the Merits and Order for Judgment; Objections to Proposed Findings of Fact and Conclusions of Law; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Designation of Record on Appeal; Notice of Cross Appeal; Bond on Cross Appeal; Extension of Time Within Which to File Record on Appeal With Appellate Court; Plaintiff's Designation of Additional Record on Appeal, which, together with certified copies of Plaintiff's Exhibit 1 and Defendant's Exhibit A, and one volume of Reporter's Transcript, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$24.90, which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 20 day of November, A. D. 1947.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke

Deputy

[Title of District Court and Cause]

Honorable Paul J. McCormick, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, Thursday, May 8, 1947

Appearances:

For the Plaintiff: Messrs. Weinstein & Bertram, by
Perry Bertram, Esquire.

For the Defendant: Messrs. Thelen, Marrin, Johnson
& Bridges, by Robert H. Sanders, Esquire.

Los Angeles, California, Thursday, May 8, 1947—
10:00 A. M.

The Court: Call the case, Mr. Clerk.

The Clerk: Louise E. Mills, Administratrix of the
Estate of Thomas C. Mills, Deceased, versus California
Shipbuilding Corporation, a corporation, No. 5870-M-
Civil.

Mr. Bertram: The plaintiff is ready, your Honor.

Mr. Sanders: Ready for the defendant, your Honor.

The Court: Proceed, gentlemen.

Mr. Sanders: Your Honor, I think it might be point-
ed out to the court that the portal to portal bill has been
passed by both the Senate and the House of Representa-
tives, according to newspaper reports, and has been sent
to the White House. I believe the report was that that
was done last Thursday or Friday. It may be that the
bill is being signed at the present time.

If so, as your Honor knows, there are certain features
of that Act which would affect our evidence in this case.
I merely mention that to the court as a possibility that

we may wish a further hearing in this matter in light of that.

Mr. Bertram: If the court please, according to my knowledge of the present form of the bill and the issues involved in this case, I do not think it will be necessary—I do not think there would be any effect upon this case on [3*] the passage of that bill.

Now, I would make no objection to an offer of evidence made in the light of what the defendant's counsel conceives the bill to contain on the ground that it is irrelevant under the present state of the law, so we might take that into consideration. But this is not a portal to portal claim.

The Court: We do not know what “portal to portal” claims are until we know what the statutory law is.

Mr. Bertram: In the sense that it is walking or traveling from the entrance to the employer's place of business to the place of work.

Mr. Sanders: I might say, your Honor, I do not think we could intelligently proceed on the theory that the bill is enacted and try to produce evidence of that because none of us have seen the bill.

The Court: The court has not seen the finished product. It has received several proposals that came from various agencies, but this court has never seen the finished bill that was the result of the concurrence of the two Houses.

I think we should hear the evidence and then if it becomes propitious to defer decision until such time as the President either acts or fails to act would be the proper procedure. [4]

Mr. Bertram: Very well, your Honor.

We might state by way of introduction that both parties have set forth their respective positions in a pre-trial statement.

The Court: Yes, I have read the memorandum and the pre-trial briefs.

Mr. Bertram: In summation the plaintiff will offer evidence to establish that the decedent did work additional hours for which he was not paid. We will not be concerned with evidence on the issue of coverage.

The Court: The pre-trial stipulation of facts and the statement of the issues has been filed?

Mr. Bertram: Yes, I believe it has. If it has not it will now be filed as a part of the record in this trial. I will look at the original file to see if it is here. Yes, it is in the file, having been filed on May 1st, 1947. You may proceed.

Mr. Bertram: Call Mr. Frank Gillen.

FRANK GILLEN,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Frank Gillen. [5]

Direct Examination

By Mr. Bertram:

Q. Mr. Gillen, what is your business or occupation?

A. Steam engineer.

Q. Are you licensed in that capacity?

A. Yes, sir.

(Testimony of Frank Gillen)

Q. Here in the state of California?

A. Yes, sir.

Q. Mr. Gillen, were you ever employed at the California Shipbuilding Corporation? A. Yes, sir.

Q. In what capacity?

A. Steam plant engineer.

Q. In the following questions, Mr. Gillen, which I have to ask you, I am going to direct your attention and ask you to direct your answers to the period commencing October 1943 and terminating in August 1945.

Were you employed at the Cal Shipbuilding Corporation during that period? A. Yes.

Q. Continuously? A. Yes, sir.

Q. During your employment in that period did you have occasion to know one Thomas C. Mills?

A. Yes. [6]

Q. Do you know in what capacity he was employed?

A. Yes, sir. He worked swing shift or graveyard shift following me. I was on swing.

Q. On the same job? A. Yes, sir.

Q. And will you describe the duties of that job as you know it?

Mr. Sanders: I object to that, your Honor, as irrelevant. The witness testified he was on the swing shift and that he knows Mr. Mills was on the graveyard shift and what this witness' duties were would have no bearing on Mr. Mills' duties.

Mr. Bertram: I did not ask the witness for his duties. I asked the witness the duties of the job as he knew it.

(Testimony of Frank Gillen)

Mr. Sanders: I object to that as being irrelevant to the issues here. The only issue before the court is the work of Mr. Mills.

The Court: I do not think it would be proper to assume this witness is qualified to testify as to the work or status of an employee who is not doing similar work. In the absence of any showing that this witness had supervision over the employee in question, Mr. Mills, the deceased, I do not believe he can testify to that.

Mr. Bertram: We will offer to show by this witness, your Honor, that the plant was operated in a certain manner; [7] that that manner made it impossible for an employee to take time off for lunch. That the manner in which it was operated was the same during all three shifts. We are faced with the situation that the employee is deceased. We will show that he was the only employee on that shift in this particular plant. That his situation was identical, this witness will testify if permitted, to the situation with respect to the witness. He was the only employee on his shift and he will testify that, if permitted, that the manner in which the work had to be performed was such that no time off could be taken for rest, relief or lunch.

The Court: Is it contended that the two men, the witness and the deceased, were co-relative workers doing precisely the same thing only at different times?

Mr. Bertram: Exactly, your Honor.

The Court: Objection overruled.

Q. By Mr. Bertram: Will you then, Mr. Gillen, describe the duties of the job as you knew it?

Mr. Sanders: May I interpose a question on voir dire here to see if this witness has got the facts or has

(Testimony of Frank Gillen)

received the facts which will give him the ability to testify as to this, other than inferences or mere hearsay on his part?

The Court: Yes, you may ask one or two questions. [8]

Voir Dire

By Mr. Sanders:

Q. Mr. Gillen, you were employed during this period, October 1943 to August 1945, on the swing shift, is that right? A. Yes, sir.

Q. And what was your job?

A. Steam plant engineer.

Q. Will you repeat that, please? I didn't get it.

A. Steam engineer.

Q. And were you on that shift the entire period?

A. I just haven't the right, exact figures of that, the date that I was taken and put in there because the plant wasn't in operation just at the start of that, but as soon as that plant was put in operation I went on it and stayed there to the finish.

Q. Now, during this period did you at any time work with Mr. Mills?

A. Yes. There was a time when we did once, a little while together.

Q. When was that?

A. Well, it was—I can't tell you that right date either, but I guess we can get it if we have to. There was a time that when they was changing the shifts there and we was heating oil in the cars. We had so many ships on those [9] docks there trying to get them all ready. There was a time when we used the steam plant and also that steam crane that we had out there, the

(Testimony of Frank Gillen)

horizontal oiler and we was heating oil with some and furnishing steam for the line with the rest when we worked over—some overtime of two hours when we would be working together on the same shift.

Q. How long a period was that? About a week or so? A. No; I think it was around two months.

Q. Two months?

A. Yes. I could tell by looking back at my time slips but I haven't been where they were for some time.

Q. Right now you are not sure whether that was during this period or possibly prior to it, are you?

A. Couldn't have been prior to it because the plant wasn't running then.

Q. Now, outside of that period of approximately two months where you worked with him for two hours, you never at any time worked on the same shift or worked with him, did you?

A. Ne, sir; he relieved me. I worked until 12:30 and he came in at twelve and was there ready to relieve me, so that I could go home at a certain time. We was always together when he come in that half hour. He and I worked up until 12:30 and he worked from 12:30 to eight.

Q. Then the only knowledge that you would have as to what Mr. Mills did on this shift, other than during this two [10] months' period, would be from the conclusion of what you did on your shift, isn't that right?

A. I knew that he couldn't do any different because it was the only way it could be operated.

Q. But you are basing that upon your conclusion of what you did during your work down there, isn't that right, Mr. Gillen? A. Yes, sir.

(Testimony of Frank Gillen)

Mr. Sanders: On the basis of that testimony, your Honor, I again interpose my objection.

The Court: Objection overruled. Mr. Gillen, to clarify the situation, how many steam engineers were there in the particular place where you worked from October 1943 to August 1945?

The Witness: You mean different ones or on each day?

The Court: Well, I want to find out about the situation. I don't know what it is myself but I think the question is clear. Read the question again.

(Question read.)

The Witness: There was three of us.

The Court: During the shift on which you worked?

The Witness: One on each shift, three of us.

The Court: Very well, proceed.

Mr. Bertram: I think I will withdraw the pending question and ask some further preliminary questions. [11]

Direct Examination (Continued)

By Mr. Bertram:

Q. Mr. Gillen, who was on the day shift?

A. Henry Sweet.

Q. And who was on the swing shift?

A. Tom was, Mills was on days for a long time and then changed and Hank Sweet was on days the last year or 16 months that it operated.

Q. And who was on the swing shift?

A. I was.

Q. And who was on the graveyard shift?

A. Tom Mills.

(Testimony of Frank Gillen)

Q. Tom Mills after he changed with Hank Sweet on the day shift? A. Yes, sir.

Q. Will you describe fully your place of work? Was it within doors?

A. Yes, your boiler room set—your boiler set along here and the office was right here—an open door against it and this building was put in here for a little place there, just a small, little place. This all opened right in together where you could set right in this office door or walk around in here or do whatever you wanted to and watch your gauges and everything right from this door.

Q. Was there one or more steam boilers? [12]

A. One.

Q. And were the boilers and the office both within doors? A. Yes, sir.

Q. Under a roof? A. Yes, sir.

Q. Where were you stationed with reference to the steam boiler, Mr. Gillen?

A. Right up against it all the time.

Q. What had to be done by the steam engineer on duty during his particular shift? A. Well—

Q. Describe the various things which had to be done.

A. Any steam boiler has to be watched pretty close and these were not automatic. These were all hand-operated. You had to watch your gauges, your water, your steam, your compressors. We had pumps to pump the fuel up to the burner. That had to be watched all the time and you had a water pump that put the water into the boilers. That had to be watched and set and regulated and you had to go around to the end of the boiler and fire it by hand.

Q. What was it fired with? A. Oil.

(Testimony of Frank Gillen)

Q. How many gauges were there to watch?

A. Four. [13]

Q. What gauges were those?

A. Your water gauge, your steam gauge and pressure gauge; your fuel line pump and the other water pump that put the water into the boiler.

Q. And how many valves were there to manipulate during the course of your work?

A. There were three.

Q. What valves were those?

A. There was both pump valves and your oil feed valve, unless your pump was shut down, and then you had your valves on your injector. That was an additional valve which we didn't use very much, only when we was packing the pumps and stuff.

Q. Will you tell us if you know, what the steam from this steam boiler was used for in that yard?

A. Yes. Your main line went right out and went right up to the outfitting docks and they used steam for heating the oil and doing all the pumping up and down the lines.

Q. Heating what oil, Mr. Gillen?

A. The oil that was pumped on all the ships and for washing out all the new boilers, all the boilers and everything. Furnishing steam on all the boats on the outfitting dock.

Q. What capacity was the steam boiler which you attended? [14]

A. That was pressure?

Q. Yes. A. 200 pounds.

Q. That was pressure and capacity—strike that. Was that boiler kept at full capacity during the greater part of the time?

A. Yes, sir.

(Testimony of Frank Gillen)

Q. Could you give us an estimate of how much of the time while you were there, the steam boiler was not kept at full capacity?

A. Well, no time unless it was being washed—it was being shut down for maybe one shift to wash out the boiler and re-brick the fire box or something.

Q. How often did that happen?

A. Well, the boiler would be washed down quite often but the re-bricking, that wouldn't be set down only for a short time for that, the re-bricking. The re-bricking of the fire box is only done about once a year.

Q. Now, Mr. Gillen, what was the situation in that steam plant with respect to the lunch period?

A. We didn't have any.

Q. Will you describe that situation?

A. Yes, sir. We carried our own lunch with us and after you are on four or five hours you feel you want a little something to eat and you get a sandwich and may be you [15] can eat it and maybe you can't. Maybe you will walk around and turn these valves up while you are eating.

Q. Mr. Gillen, what was the longest period of time that you could leave that steam boiler unwatched or unattended?

A. Well, that depends.

Q. Give me the longest period of time.

A. I wouldn't say that you ought to be away from it over five minutes and sometimes not two or three minutes.

Q. Were there toilets—toilet facilities provided for you, Mr. Gillen?

A. Yes, sir, right at the back of the building.

(Testimony of Frank Gillen)

Q. How long would you have to take away from the boiler to go to the toilet?

A. Well, you had better make it pretty quick.

Q. What would you say would be the time in minutes, if you know?

A. Well, I wouldn't say five minutes.

Q. Was that toilet used by the employees generally in the yard or only the steam plant employees?

A. At the first start it was used only for us—the one that was put in there when the plant was built was only for that particular reason, but about a year later, before the yard was closed up, they built a new one there within arm's reach of the building and that was for the outfitting [16] dock workers, for everybody—men and women both. A big double one.

Q. Mr. Gillen, you say you brought a lunch to work on your shift? A. Always.

Q. Do you remember any occasion when you were able to eat that lunch from beginning to end uninterrupted? A. Well, I don't know as I ever did.

Q. Do you know whether or not Mr. Mills brought a lunch with him?

A. Yes, he did. He carried his lunch.

Q. Do you know what he carried?

A. Well, he didn't carry the kind of lunch that I did but he carried more fruit than anything else.

Q. Now, you testified earlier that Mr. Mills came to work about twelve o'clock midnight?

A. Yes, sir.

Q. Do you know what time the shift started?

A. 12:30.

(Testimony of Frank Gillen)

Q. What did he do in that first half hour between the time he got to work and the time his shift started?

A. Well, you see we had our meters to read and one thing and another and when you are leaving a shift you read your meters, of what you have used, and you always figure on being there a little ahead of time so the other man can get [17] washed up and get relieved and go home. But they read those meters before he starts in at 12:30. There wasn't much to do but sometimes you don't always get in that yard at the same time when you are coming to work. You might be there at 12:15 or 12:00 or 12:20, just so you are there ahead of the time you have to go to work.

Q. So we may be clear, Mr. Gillen, when you used the word "you" do you refer to Mr. Mills?

A. Yes; any man relieving the other man. He can't always be there at the same minute.

Q. Now, Mr. Gillen, during the period of about two months when you stayed over for some two hours beyond the end of your shift, what did both you and Mr. Mills do?

A. I think I stated that. You see we was operating the steam plant and the boiler both when they had eight and nine ships on the docks and they were furnishing steam for heating oil and pumping oil and that kind of stuff.

Q. In other words, one of you attended the regular steam boiler? A. Sure.

Q. And the other attended the spare that was being used, is that it? A. Yes.

(Testimony of Frank Gillen)

Q. Mr. Gillen, was any employee provided to relieve you for lunch or other rest periods? [18]

A. No, sir.

Q. How far away could you get from the steam boiler at any time while you were on duty?

Mr. Sanders: I object to that as calling for a conclusion of the witness. He hasn't testified he ever got away from the boiler.

Mr. Bertram: Let me re-phrase the question.

Q. By Mr. Bertram: Are there any regulations which you, as a licensed engineer, are familiar with, which prescribed the distance away from the steam boiler which you may get?

A. I think the City of Los Angeles doesn't allow you over—I don't know whether it is 100 or 200 feet, but I know I never left that far myself.

Mr. Bertram: You may cross examine.

Cross Examination

By Mr. Sanders:

Q. Did you go to work at the Cal Ship as an engineer, Mr. Gillen? A. No, sir.

Q. When did you first start working there as an engineer?

A. Just shortly after they put the boiler in. I don't know the exact date. About 16 months before it closed down.

Q. What year was that? Was that in 1943? [19]

A. Yes.

Q. And had you done that type of work before you went to work at Cal Ship?

A. Well, since I was 14 years old, yes.

(Testimony of Frank Gillen)

Q. Working with steam boilers and things like that?

A. Yes, sir.

Q. And the practice where you worked on other steam plants as an engineer—did you ever work in one where you were the only engineer present on your shift?

A. Yes, sir.

Q. And you, in that employment at other places, were required to stay in the vicinity of the boiler, weren't you?

A. Yes, sir.

Q. And you understood that when you took that job at Cal Ship, didn't you?

A. Understood what?

Q. You understood that you were supposed to remain in that vicinity, in the vicinity of the boiler when you took the job at Cal Ship?

A. I think you will find that every steam engineer has to stay with his engine until he is relieved.

Q. As a licensed engineer you have to be familiar with those regulations?

A. Yes, sir.

Q. Now, isn't it true that you were allowed to bring [20] your lunch and you were told to bring your lunch and eat it during your shift?

A. Nobody ever said anything about it, about my bringing my lunch.

Q. Well, prior to becoming the steam engineer at Cal Ship you brought your lunch to work, didn't you, and you ate it during the shift?

A. I carried a lunch there. I carried a lunch all the time I worked for Cal Ship.

Q. Now, in the steam plant you stated there was a little office there?

A. Yes.

Q. What was this little office? Will you describe that for me?

(Testimony of Frank Gillen)

A. Yes. A building about eight foot square where we kept water softener in there so it wouldn't get wet or dirty, the salt and stuff and also we used it for our office. It was about eight or ten foot square right on the south side of the steam plant building.

Q. And did you have a desk and chair in there?

A. Yes, sir.

Q. And was that where you normally had your lunch?

A. Yes, sir.

Q. And whereabouts were these gauges that you watched in relation to the office? [21]

A. Right in front of you.

Q. Just outside the office? A. Yes, sir.

Q. And during the course of your shift you would have lull periods, wouldn't you, when you would be able to sit down?

A. Sometimes if they wasn't pulling too heavy. It depended on how many ships were on the outfitting docks. If there was a full line of them there they were pulling every pound it could make because the boilers wasn't too large for the job. But if they was a fewer on—it depended on how many boilers they was washing out at the time too. That was your heavy pull.

Q. You would know pretty well when you came on a given day what kind of run your boilers was going to have to make, wouldn't you? A. No.

Q. That would change from hour to hour?

A. Yes, sir.

Q. And how often would you have to fire the boiler by hand? A. All the time.

Q. Well, now, you don't mean by "all the time" every minute of your shift?

(Testimony of Frank Gillen)

A. I mean that you couldn't—you can't, unless you [22] have got an automatic feed—you can't regulate an oil burner boiler up there because you don't know any minute what time four or five valves up the line are going to be pulled wide open. They are three-inch valves and when they pull that you had better keep busy or you ain't going to have any steam. You can change them every five minutes the whole shift or every two or three minutes sometimes.

Q. Well, normally you wouldn't be firing the boiler every three minutes for your swing shift?

A. No; but I have been there eight hours when I walked back and forth wondering whether I was going to keep it up from then on and didn't set down in that office during that eight hours. That is how busy we was when we had a lot of ships on that outfitting dock.

Q. That was an exceptional situation, though? You didn't do that most of the time, did you, Mr. Gillen?

A. A good many months that we did do that.

Mr. Sanders: Now, before I proceed further, your Honor, I would like to inquire if counsel is enlarging the issues here as to this early time that he brought out when Mr. Mills came to work, and injecting the portal to portal phase in this or not.

Mr. Bertram: There again we are confused as to terms. That is, I don't call it "portal to portal". Because of the unusual nature of this claim—that is, I was retained by [23] the widow after the passing away of the employee. I didn't know that the man came to work a half hour early.

The Witness: I didn't come to work—I didn't say that.

(Testimony of Frank Gillen)

Mr. Sanders: We went over the time cards together.

Mr. Bertram: I think since we have joined the issue and framed the issues as to the half hour lunch period that we will confine our claim to that. I should, of course, consult my client as to that but we have learned something here that I didn't know before. If I may have just a moment to do that.

The Court: Very well.

Mr. Bertram: Mrs. Mills says she is prepared to keep the issue confined to the lunch hour that we claim was lost, a half hour lunch period each day at work.

The Court: Do you mean by that you are reserving for some other case any additional time?

Mr. Bertram: No, your Honor. It is my understanding that once an action is brought for overtime wages under the Fair Labor Standards Act that becomes *res adjudicata* as to all the issues which might be litigated in that claim.

The Court: That is your position and it is so understood?

Mr. Bertram: Yes.

The Court: Proceed. [24]

Q. By Mr. Sanders: What were the hours that you worked, Mr. Gillen, in the afternoon? Until sometime around midnight, was it not? A. Four to 12:30.

Q. What time would you normally have your lunch on that shift? About nine o'clock?

A. Oh, any time along there.

Q. Well, I mean normally you would probably have some time when you preferred to eat your meal, didn't you?

(Testimony of Frank Gillen)

A. About that time. Sometimes a little earlier or a little later. It could be when you get good and hungry. That was generally the time that everybody did eat.

Q. These gauges that you would watch you could watch from the desk where you say you ate your lunch?

A. Yes.

Q. And what gauges were important to watch from the safety standpoint?

A. The main thing on the boiler is the water.

Q. The water gauge?

A. And the steam comes next.

Q. As a part of your duties you were supposed to visually watch these gauges at all times? A. Yes.

Q. By that question I don't mean you would keep your eyes fixed on them continually for eight hours but you are to [25] take a look at the gauges quite often, is that right? A. Yes, sir.

Q. Now, aside from firing the boiler what other duties were there that occurred quite often, regularly during the shift?

A. The firing wasn't any more—there is nothing to firing a boiler, but you have got to keep your pumps and everything and gauges working and everything and you have got to keep everything working in order to keep water in there and it is oil fed. It has to be set at the right temperature. Now, if four or five of those valves are dragged open at once up there the heavy draw on that can siphon the water out of your boiler. If the cold water comes up and hits that pipeline anywhere along there that cold water will siphon that water out of the boiler and you don't know when it is going to do that. You have to be ready at all times for those emergencies.

(Testimony of Frank Gillen)

Q. You say there is nothing to firing a boiler. You mean by that that it takes only a matter of a few seconds to do that? A. Yes.

Q. Describe to the court what is necessary to be done?

A. It takes every minute of your eight hours to keep watching to see that it is fired right.

Q. How do you watch it to see that it is fired right? [26] You mean you look at a gauge or look at the fire itself?

A. Well, you can look at your fire for one thing and you can look at your—you don't want a fire that smokes. You want a white fire. You have to keep it regulated the right height—high enough on there to hold your steam at the right temperature all the time.

Q. Now, isn't it true that during your shift normally you would have periods of time when you would be able to sit down at the desk and you wouldn't have any duties to do? A. Sometimes.

Q. And isn't it true that that would occur more than once, generally, during a shift?

A. Well, I guess you could probably take a few minutes at a time—maybe five or ten minutes sometimes. There are certain times that they are dragging you heavier than others. That can't be steady.

Q. And when you elected to sit down for lunch you would normally take a time when you thought there would be a lull period, wouldn't you, so you would be able to eat your meal without being interrupted?

A. Yes, sir, it would be better.

Q. Did they have a hot plate in there to make coffee on? A. No, a steam pipe.

(Testimony of Frank Gillen)

Q. You didn't have any way to get coffee? [27]

A. Yes, a steam pipe.

Q. You did have coffee there? A. Certainly.

Q. And you would have time to, various times throughout the shift to have a cup of coffee, wouldn't you?

A. Yes, sir.

Q. And you were never told that you were not to eat your lunch during your shift, were you, Mr. Gillen?

A. Well, no, they wouldn't tell you that.

Q. In fact it was your understanding you were to take your lunch and eat it during the shift?

A. Yes, sir.

The Court: I didn't hear you.

The Witness: We carried our lunch and ate it in the plant. We couldn't leave the plant to go out any place else to get lunch.

Q. By Mr. Sanders: From your observation of the employees in the shipyard the majority of the employees brought their lunch, didn't they, Mr. Gillen?

A. Well, they had to for a long time until they put some lunch wagons around in the yard. Some of them ate off of them but plenty of them didn't because they had too far to go to get to them and took too much time to get to them and the biggest share of them carried their lunches.

Q. Were there ever occasions when you were unable to [28] bring your lunch to work with you?

A. No, sir. I live at home. I always took it with me.

Q. Did you file suit against the Cal Shipbuilding Corporation? A. Yes, sir.

(Testimony of Frank Gillen)

Q. When did you file suit, Mr. Gillen?

A. Oh, that was—I don't remember. I have already got paid anyway.

The Court: I didn't understand that, Mr. Gillen.

The Witness: I don't remember the date that I filed it.

The Court: I understand that but I didn't understand the rest of your answer. Did you mean that you settled the suit?

The Witness: Yes, they paid us—they paid me.

The Court: Then the suit is not pending now?

The Witness: No, sir.

Q. By Mr. Sanders: From your observation, from your own observation you have no idea what period of time Mr. Mills took to eat his lunch?

A. I can't say that.

Q. Your answer is you cannot?

A. I can't because I wasn't there on that shift but he had the same duties that I did and he could have et it any time during the eight hours that he was on duty. [29]

Q. But you do know from your own observation that he did bring his lunch?

A. He did carry his lunch with him, yes, sir. We had our lunch boxes setting right on the same bench when he come in and I know that.

Q. As far as you know, none of your superiors ever gave you orders that you were not to eat your lunch?

A. No, sir.

Q. During the shift? A. No, sir.

Mr. Sanders: That is all.

(Testimony of Frank Gillen)

Redirect Examination

By Mr. Bertram:

Q. Mr. Gillen, were there any occasions when you were not able to eat your lunch at all?

Mr. Sanders: I object to that as indefinite. You mean in the shipyard?

Mr. Bertram: Well, I am confining my questions, as I originally stated, to this period October 1943 to August of 1945.

Q. By Mr. Bertram: Let me further state: While you were employed on the swing shift on the steam plant?

A. No, I never worked a full shift there without eating.

Q. Were there any occasions when you were not able to [30] complete your lunch?

A. Yes, there were.

Q. How often did that happen?

A. Oh, two or three or four or five times while I was there.

Q. You stated on cross examination, Mr. Gillen, that it would be better to pick a lull period to start eating your lunch. What would there be about the work that would indicate a lull period?

A. Well, you see, they were—when those new boilers were put in those ships they all had to be—chemicals were put in them and then they had to be flushed out from our boiler out of the plant I was operating—the boiler I was operating furnished the steam to flush out all the boilers on those ships and there is a time when they are flushing them heavy and then when the valve is draining off there is a lull time in between each one of

(Testimony of Frank Gillen)

those flushes and that lasts about 48 hours while they are washing those ships out.

Q. Do you mean a lull period lasting for 48 hours?

A. No. I mean it takes that long to wash those boilers out while they are drawing heavy off from us, filling those boilers. That is when you got to change your fires all the time and then when they are flushing that out then you can ease off again on it. They have a gauge there in that plant run by electricity and that gauge shows a line right on [31] around just—not straight—you don't get it quite straight. It shows a line right around that tells just exactly what you do every minute of that 24 hours and you can tell by what they are drawing on that just exactly what you can do with your own boiler because a hand will go out and come back in according to the pressure they are drawing all the time.

Q. Mr. Gillen, was there any way for you to know, for example, that the large three-inch valves you spoke of would not be operated for a while?

A. No, no way whatever of knowing.

Q. They might be opened any time?

A. Any time, yes.

Q. Then what would you have to do, if anything?

A. Put on some more heat.

Q. What would you do in order to put on more heat?

A. Walk out around to the end and open your valves up bigger.

Q. What valves? A. The oil feed valves.

Q. That is increase the feed of oil?

A. Yes, sir.

(Testimony of Frank Gillen)

Q. What effect would opening the three-inch valves have on the water supply?

A. Pull it down pretty fast. [32]

Q. If that happened was there any danger involved?

A. (No answer.)

The Court: What do you mean by "danger"?

Mr. Bertram: Danger within the plant or to the boiler or equipment or yourself.

The Witness: You draw it down and get too low on water there would be danger. A steam boiler has got to have water in it at all times, you know.

Q. By Mr. Bertram: What would the danger be?

A. Blow up.

Q. You testified on cross examination, Mr. Gillen, that from your observation the majority of the employees in that shipyard carried their lunches with them?

A. They had to in the first part, when the yard first opened up. They had to because there was no place in that yard to eat. You had to carry your lunch.

Q. From your observation of that fact do you know whether or not there was a specific, designated time set aside for the majority of the employees to eat their lunch?

A. There was for people outside of the plant.

Q. What time was that?

A. (No answer.)

Mr. Sanders: You mean men on his shift?

Mr. Bertram: I am speaking of your shift.

A. (No answer.) [33]

Q. By Mr. Bertram: I don't mean the time of day; I mean how long a period of time was it?

A. I don't—I believe it is four hours.

(Testimony of Frank Gillen)

Mr. Bertram: Counsel and I discussed this question. Perhaps we may stipulate to it. May it be stipulated that a half hour lunch period was set aside on the schedule for each of the three shifts?

Mr. Sanders: For certain classes of the shipyard employees, your Honor, that is true. Not as to this particular class. For example, not as to guards and firemen.

Q. By Mr. Bertram: During the time you were eating your lunch, Mr. Gillen, did you have to give attention to the gauges and the valves?

A. Certainly.

Q. And other equipment? A. Yes, sir.

Q. Were you ever able to eat any lunch without giving attention to your equipment? A. No.

Mr. Bertram: That is all I have, your Honor.

Recross Examination

By Mr. Sanders:

Q. When you would be required to put on more heat as you phrase it, just what was the mechanics of that, Mr. Gillen? [34]

A. You had to open your valve up, turn more oil on, and turn more pressure on your oil pumps to furnish the fuel to put the oil into the burner.

Q. It was a matter of turning a valve with your hand, is that right? A. Yes, sir.

Q. Then you would look at the gauge and get it up to a given pressure? A. Yes, sir.

Q. How long did that operation take? Would you say 30 seconds? A. What for?

Q. Putting on more heat.

(Testimony of Frank Gillen)

A. Well, if your pressure starts dropping down you have got to go down there and turn the valves on. They were operated by hand and they were out on the furtherest end of the boiler, and you turned those on and come back and watched your gauges. If your steam was picking up a little bit too much you would cut them down a little or if it started to smoke a little you would cut them down, but you had to keep them up to a certain temperature all the time to keep your steam up where they had to have it to use on the line.

Q. Unless you turned it on too high or it was smoking all it consisted of then was turning the valve up a little bit? [35]

A. Up or down all the time. You had to regulate it by hand.

Q. And when you were eating your lunch in this office you would have to occasionally look at the gauges, is that right? A. Yes, sir.

Q. Outside of that, that is the only thing—that was your chief job of being there, to watch the gauges to see that the equipment did not blow up?

A. Yes, sir.

Q. Outside of watching the gauges when you were actually eating your lunch you didn't do any other work, did you?

A. We never did none of that. That was the same work we had for that. That was an engineer's job, the same work for eight hours.

Mr. Sanders: I have no further questions, your Honor.

Mr. Bertram: I am not quite clear as to the last answer.

(Testimony of Frank Gillen)

Redirect Examination

By Mr. Bertram:

Q. When you say "the same work"—you testified your work consisted of not only watching gauges but checking valves?

A. That was our job. That was the work we done. [36] That was our work for the whole eight-hour period—watching the valves and fire and steam. A steam engineer's job is that work and we didn't do any outside work—only watch that boiler.

Q. Did those duties claim your attention while you were eating as well as while you were not eating?

A. All the time.

Mr. Bertram: That is all.

The Court: Mr. Gillen, I understood you to testify your hours were from four to 12:30?

The Witness: Yes, sir.

The Court: Now you say you worked eight hours?

The Witness: We did. We went on at four and we was done at 12:30.

The Court: That would be eight hours and a half.

The Witness: That is the half hour that we was supposed to be paid for that we never got. Some of them did and part of them didn't because the yard people got 30 minutes off for lunch but the man on the steam plant couldn't have any time off because he had no relief man and you can't leave a boiler without a relief man.

The Court: How could you practically have a relief man?

The Witness: It would be only one way. You could do it if the company furnished a man. They would

(Testimony of Frank Gillen)

have to have a man for each shift and we didn't have any spare engineers in [37] the yard.

The Court: When he was not relieving one of the engineers he would have to stand by and do nothing, wouldn't he?

The Witness: Yes, sir, that would be the way he would have to be. If they furnished a relief on one shift he would naturally have to have one on another shift and you couldn't get a man from some other job and bring him down there and put him on and still put him back and work him on the same job again.

The Court: Well, the time a man would take to eat his lunch would depend upon the man, wouldn't it? It would depend on how much he ate and what he ate, wouldn't it?

The Witness: Yes, sir.

The Court: That would be a difficult matter also, wouldn't it, to standardize and make it uniform?

The Witness: We never did. We would go in there and work four or five hours and if we started to getting hungry we had no half hour to set down and eat as anybody else did.

The Court: It might not take a half hour?

The Witness: No; 10 or 15 minutes, but if we got hungry we could go and get a sandwich out and we had our chair right in the door of the office when we used it. Sometimes didn't never use it but you could see all the gauges and watch that right from that—from our office door and [38] we could eat a sandwich at that time if we wanted to. Nobody ever come there and told us when our lunch period was to eat or nothing. That was up to us.

(Testimony of Frank Gillen)

The Court: If you felt like taking a little nourishment you could do so?

The Witness: Certainly.

The Court: Foodstuff was available in your lunch box?

The Witness: Yes, sir.

The Court: Now, during the periods when you sat there observing the mechanism and gauges and valves and so forth what would the engineer have to do at all times?

The Witness: He had the same job all the eight hours. You would set there and watch your gauges—if your steam was dropping, the same as any boiler or any engine, they are all the same, everyone of them is the same. If your gauge starts to drop and you walk out and turn on a little more oil and you will pick it up and try to hold it as near as possible at the same pressure all the time, and if it starts crowding up a little bit, getting a little low on water—sometimes you are trading steam for water back and forth for a while until you get even up where you belong and, well, I won't mention that. I was going to say—I guess I had better not.

The Court: Say it if you have something in mind.

The Witness: If we would have had three boilers in [39] there where that one was, had two on all the time and one for a standby we could have held a nice steady steam pressure at all times, but there was only one boiler and they depended on me for steam and it had to be put up at the outfitting dock from that one plant and you had to watch it mighty close all the time.

The Court: How many of those steam boiler plants were there at the ship yard?

(Testimony of Frank Gillen)

The Witness: One.

The Court: Just one?

The Witness: Yes, sir; one.

The Court: And only three engineers?

The Witness: Three shifts, yes, one on each shift.

The Court: When Mr. Mills came on duty he was relieving you, was he?

The Witness: Yes, sir.

The Court: What time did he come on duty?

The Witness: His time started at 12:30.

The Court: You say his time started at 12:30. I asked you what time he came on duty?

The Witness: Well, any time between 12:00 and 12:30. It all depended. Sometimes he didn't always get in the yard at the same time.

The Court: In other words, the problem of the enterprise was that you wanted to go home when your time finished [40] at 12:30?

The Witness: Yes, sir.

The Court: And therefore the man who was going to take your place had to be there at 12:30?

The Witness: Yes, any time before that.

The Court: Couldn't be worked any other way?

The Witness: No; I couldn't leave until he come.

The Court: And he was required to be there when you wanted to go?

The Witness: Yes, sir.

The Court: And in order to get there he had to, unless he had some other means of conveyance, he had to use his physical abilities and senses to get there?

The Witness: You see, things were different during the war than they are now. We rode with others and

(Testimony of Frank Gillen)

others rode with us and we had a certain time to go and come and everybody tried to be on time.

The Court: Everybody cooperated. They shared the rides?

The Witness: Yes, sir.

The Court: They were not interested entirely in the commercial aspect of it, the wage? They were doing that patriotic work?

The Witness: Yes, sir.

The Court: And that was part of the incentive and [41] motive under which men worked in these activities?

The Witness: Yes, sir.

The Court: A war activity, was it not?

The Witness: Yes, sir.

The Court: So there was an entirely different situation then than would exist during peace time activities?

The Witness: Yes, sir.

The Court: Where it is all a matter of profit for everybody who engages in the work. Isn't that true, Mr. Gillen?

The Witness: I think they were more accurate then than they ever were before or since.

The Court: The profit incentive was not the entire motivation of the work?

The Witness: No.

The Court: Whether management or labor?

The Witness: No.

The Court: There was this patriotic feature that was involved, isn't that right?

The Witness: Yes, sir.

(Testimony of Frank Gillen)

The Court: Everybody was anxious to do what they could on the job to promote the national security?

The Witness: That is right.

The Court: In other words, it was a wartime activity, was it not? [42]

The Witness: Yes, sir.

The Court: These shifts that were being serviced by the steam and the heat were not ships that were to go out in trade, but they were to go out as weapons, weren't they?

The Witness: Yes, sir; they were—No, the last month or two—don't get this wrong now. They were all new ships being built and new boilers being put in them and all of that, but the last few months—I don't know, two, three, four, or five, something like that, and then they did repair some that was coming back in and going out again, but up to that they were all new ships being built.

The Court: But those that were coming back for repairs were being repaired so they could go out as weapons again?

The Witness: Yes, sir.

The Court: And not to carry trade between individuals?

The Witness: No.

The Court: Now, about your own case. You testified that you had a case against the shipbuilding company or that you had filed one, I believe?

The Witness: Yes, sir.

The Court: Did you have an attorney in that case?

(Testimony of Frank Gillen)

The Witness: Yes, sir; the man right here, the same attorney.

The Court: But you effected a settlement with the shipyard that was satisfactory to you? [43]

The Witness: Yes, sir.

The Court: Was that settlement, and I am not asking about the amount, but was that settlement based upon any specific and certain allowance for lunch time?

The Witness: Yes. I think, if I am not mistaken, that they allowed us so many hours for that length of time and paid for that much overtime. Now, wait a minute—I haven't got those figures on that but I could tell you just exactly what it amounted to.

The Court: I don't mean in money, but what did it amount to in time?

The Witness: In hours overtime—overtime hours.

The Court: So that we may get it down to the amount allowed for each shift, was it 20 minutes? If you don't remember just say so.

The Witness: I can figure that all out if you give me a pencil and paper. It will take a little while. It amounted to, about, in the neighborhood of \$1.00 a day.

The Court: What was the hourly wage that you were receiving there?

The Witness: \$1.68 an hour, but after you worked those 40 hours you run into overtime and that changes your time scale again.

The Court: Then of course in the settlement the feature of liquidated damages came into it, did it not? [44]

(Testimony of Frank Gillen)

The Witness: Yes, sir.

The Court: And attorney fees also?

The Witness: Yes, sir.

The Court: Did each of the men commence separate suits or were you all consolidated together? You all had about the same cause of action?

The Witness: They were all together as far as I know in the beginning with the exception that Mr. Mills had died during that length of time and there was nobody to put in his claim when the rest of us did put in, but—

The Court: I think that is all, Mr. Gillen.

Mr. Bertram: The court's question has opened up a new matter.

The Court: The court prefers that you gentlemen finish with your examination.

Mr. Bertram: I have a question regarding the other engineers that were employed.

The Court: I do not want it understood as a practice that when you two gentlemen finish your examination and the court take up the inquiry and develops a new lead, that that opens up the thing for you again. You may ask all the questions you want, both on direct and on cross examination, then when you have done so you have finished. I will permit it this time but I don't want that practice started here. [45]

Mr. Bertram: I don't think it is too material, whether they could have done it another way or not. The issue is what they actually did and whether the men did have a lunch hour to themselves.

The Court: You can ask the question.

(Testimony of Frank Gillen)

Redirect Examination

By Mr. Bertram:

Q. Mr. Gillen, there were other engineers employed at the plant, were there not, on all three shifts as far as you knew? A. Yes, sir.

Q. As well as you knew? A. Yes, sir.

Q. Did some of those engineers at one time or another work in the steam plant, do you know?

Mr. Sanders: I object to this as too general a question. It encompasses a large number of classifications in a shipyard. It is not definite enough for me to know what the witness' answer might indicate.

The Court: I think it should be specific as to the type of work that you are referring to.

Mr. Bertram: I think if we find that engineers did take over in the steam plant that would answer the question. I don't want to ask the witness whether there were other engineers who were qualified as steam plant engineers. He [46] may or may not know.

The Court: I understood you to answer the court's question, Mr. Gillen, with reference to that. Perhaps I did not understand you correctly.

The Witness: I didn't answer anything yet. I don't know what he wants me to say.

The Court: I am speaking of the court's question. I understood you to say there were three engineers during the 24 hours?

The Witness: Yes, sir.

The Court: That is what I understood him to say.

(Testimony of Frank Gillen)

Now, were there any others than the three that worked in this plant during that period of time?

The Witness: No, that is all.

Mr. Bertram: That is all I have.

The Court: Call your next witness.

Mr. Bertram: Call Mr. Alcott.

MELVILLE ALCOTT,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Melville Alcott. [47]

Direct Examination

By Mr. Bertram:

Q. Mr. Alcott, were you at any time employed by the Cal Shipbuilding Corporation?

A. I was employed April, 1941, to May 8th, 1946.

Q. I am going to direct my questions and I wish you would direct your answers, Mr. Alcott, to the period from October 1943 to August 1945. During that period did you have occasion to know one Thomas C. Mills?

A. I did.

Q. Do you know in what capacity he was employed?

A. Graveyard engineer at the steam plant the majority of the time.

Q. And during that period of time in what capacity were you employed?

A. I was assistant chief inspector in charge of maintenance and utilities.

(Testimony of Melville Alcott)

Q. Did your duties involve supervision over the duties of Mr. Mills? A. Yes.

Q. And likewise over the duties of Mr. Gillen?

A. Yes, sir.

Q. And also of Mr. Sweet?

A. All utilities, Mr. Sweet also.

Q. The steam plant was classified as a utility for [48] that purpose, was it?

A. Acetylene plant, two compressor plants and one steam plant.

Q. On what shift were your duties principally performed?

A. Principally on the day shift but I was in charge of all three shifts.

Q. Did you have occasion to visit the steam plant during the shift of Mr. Mills, the graveyard shift?

A. Occasionally.

Q. Are you familiar with what his duties were?

A. Yes.

Q. Will you describe them, please?

A. His duties were to, and the duties as an engineer in the steam plant, was to fire and take care of the boiler in the way as an engineer should. Now, an engineer's duty on a boiler are to see that he has plenty of water, is to furnish sufficient steam, take care of his water softening system and his oil.

Q. Did those duties of Mr. Mills to your knowledge, require Mr. Mills' constant attention?

Mr. Sanders: I object to that as calling for a conclusion of the witness, your Honor, except on those occasions when Mr. Alcott was present.

(Testimony of Melville Alcott)

The Court: Objection overruled. [49]

Mr. Sanders: On the further ground it is hearsay.

The Court: You were his superior there, were you, Mr. Alcott?

The Witness: Yes, sir.

The Court: Overruled.

Mr. Sanders: I believe he testified he was only present occasionally on Mr. Mills' shift.

The Court: Objection overruled. Answer the question.

The Witness: What was the question?

The Court: Read the question.

(Question read.)

A. Well, the duties of an engineer, and I will say Mr. Mills performed his duties as an engineer, were to stay at his boiler or within 200 feet of his boiler and not be absent over ten minutes at any one time from his boiler and he performed those duties.

Q. By Mr. Bertram: Mr. Alcott, what would you say would be the longest period of time that Mr. Mills might leave the equipment unattended?

Mr. Sanders: That has already been asked and answered. I believe he said ten minutes.

The Court: I believe it has. That would follow as a deduction from what he just said.

Q. By Mr. Bertram: Mr. Alcott, do you know whether or not Mr. Mills was relieved for lunch—during the lunch [50] period?

A. Not to my knowledge.

(Testimony of Melville Alcott)

Q. If any provision to that effect were made it would be your duty to look after it, would it not?

A. There was a provision made for that purpose but it was never used for the simple reason that it was impossible to get a telephone installed at the steam plant on account of the shortage of instruments. Therefore, the engineer was not in communication with his relief or his possible relief. In other words, the crane department carried the engineers who were not in the utilities, and they had several steam engineers and it was possible for them to have relieved him if called for but it was impossible for him to call them.

Q. If relief had been provided it would have come to your knowledge, would it not? A. Oh, yes.

Q. Mr. Alcott, you heard the testimony of Mr. Gillen describing his duties on the swing shift?

A. Yes, sir.

Q. Based upon your knowledge and your supervision of those employees would you say those duties were identical with those performed by Mr. Mills on his graveyard shift? A. Practically, yes.

Mr. Bertram: You may cross examine. [51]

Cross Examination

By Mr. Sanders

Q. Mr. Alcott, what other utility plants were there close by the steam plant, if any?

A. I beg your pardon?

Q. What other utility plants were close by, adjacent to the steam plant, if any? A. There were none.

Q. Were there any other buildings close by?

A. Well, not within 100 feet except the restrooms.

(Testimony of Melville Alcott)

Q. Now, what was the provision or understanding, if any—strike that. Did you give any instructions to these engineers, particularly Mr. Mills, pertaining to his lunch period?

A. I think I can clarify that if you will allow me to use my own words. At the time that we started the compressor plants we run it straight through—well, take the day shift as an instance, we run from eight to 4:30 and there was some question regarding the noon hour so Mr. Keel, who had—he was the head of the department, asked if we could not shut down during the noon hour, the noon half-hour, I should say. We tried it one day and we found out it was impossible to do that, and after that time it was understood—I don't know as any order was ever issued to that effect, but it was understood among all the men in the utilities that [52] they would work straight through on the regular shifts which were, well, you know what they were.

Q. Do you recall the shift, the hours of the shift Mr. Mills worked? That is the graveyard shift?

A. Graveyard shift?

Q. 12:30 to 8:00, was it not? A. Right.

Q. And you knew that these steam engineers were taking their lunch to work with them and that they were eating their lunch during the shift, didn't you?

A. Why, certainly.

Q. And the nature of the work and the personnel you had at hand you could not schedule any set half hour to close down the plant, is that right?

A. It was impossible to close the plant down at any time during the 24 hours.

(Testimony of Melville Alcott)

Q. So it was understood the men were to eat their lunch and sometimes eat their lunch whenever they had a lull period during the shift?

A. Whenever they could.

Q. From your knowledge of the steam plant there would be lull periods, wouldn't there?

A. Well, no, I wouldn't say that. There might possibly be during some days but when steaming boilers there was a period of 48 hours at least, sometimes longer, that the boiler was pushed away beyond its capacity which required [53] ed constant attention. We installed a flow meter in the steam plant, not for the purpose of checking the engineers but for the purpose of seeing whether that one boiler would possibly carry the load that we had on it or if we would have to buy another boiler. Those charts, I believe, are on record at the present time. That is, they are in the Cal Ship records, and they will show we used at some times as high as 5,000 pounds per hour, which is about 250 per cent of capacity of that particular boiler and when running that way an engineer would be required to give it constant attention.

Q. Well, there were—you heard Mr. Gillen testify that there would be occasions when, maybe, there would be a ten-minute period where he could sit down and just watch the gauges, didn't you?

A. Well, that is possible on any boiler.

Q. And it was considered safe to leave the boiler room unattended for ten minutes, is that correct?

A. Well, the only way I could answer that question is the fact that the boiler Code of Los Angeles, the City of Los Angeles, says that a man can't leave it for over

(Testimony of Melville Alcott)

ten minutes at a time. Evidently they figure that ten minutes is allowable.

Q. What I was getting at is, it was possible to have a ten-minute period where the engineer would be devoid of any [54] duties?

A. Not at all times with that particular boiler, no.

Q. I understand that, but it would be possible during the shift to have such periods?

A. No, not necessarily. If they were steaming the boiler the boiler was under a constant load for that period of time that I mentioned and it would be impossible for an engineer to have left the boiler for more than, oh, I will say five minutes at a time. If I was operating the boiler I would figure that would be the way I would have to do and I am a steam engineer.

The Court: You mean continuously.

The Witness: Yes, continuously.

Q. By Mr. Sanders: How long have you been associated with the work of steam engineering, Mr. Alcott?

A. 35 years.

Q. And it has usually been the custom and practice where you worked that the engineers would eat right in the boiler room? A. I didn't quite understand you.

Q. It is customary in practically all plants for the engineer to eat his lunch in the boiler room?

A. Yes, sir.

Q. Now, as I understand it, your testimony is there was an oral understanding between you and the men that they [55] would eat their lunch during their shift?

A. That was my understanding.

Q. And that is all that was ever said about it?

A. Yes.

(Testimony of Melville Alcott)

Q. Do you know how near the closest telephone was to the steam plant?

A. Well, at the time the steam plant was installed I think about 500 feet. Later there was a telephone put in in another building that was built, probably 200 feet.

Q. In other words, a man could have walked over to the building and telephoned and been back in less than ten minutes, couldn't he?

A. It would have been possible for him to do that.

Q. Were there ever occasions when you had to relieve the steam engineer?

A. Me personally?

Q. Or to cause a relief to be effected?

A. No.

Q. Was Mr. Mills' work satisfactory at all times?

A. His work was satisfactory at all times.

Q. When was the steam plant put in, what year?

A. That was put in, I think, in 1943. I am not certain as to my dates on that. I haven't got any data on that at all.

Q. The compressor plant was another building, was it? [56]

A. Yes, two other buildings.

Q. Isn't it true, Mr. Mills worked in the compressor plant part of the period between October 1943 and August 1945 according to your recollection?

A. I think that he did to the best of my recollection, but I can't tell you absolutely whether that is true or not because I don't remember the dates on which the steam plant was installed.

Q. Now, you stated on direct examination that you did personally see Mr. Mills at his work on the graveyard shift several times during his employment there?

A. Did I?

Q. Yes.

(Testimony of Melville Alcott)

A. At various times.

Q. Well, just approximately how many times would you say?

A. Well, probably twice a week. As a general rule I tried to be in the plant by seven o'clock. I had the acetylene plant to take care of, the two compressor plants and the steam plant and I could make all three of them in the same day, that is on the graveyard shift, and I tried to make every one in rotation.

Q. Your observations of Mr. Mills then were toward the end of his shift, around seven o'clock in the morning?

A. Yes, unless I happened to come in during the night. [57]

Q. Did you ever observe him eating his lunch, do you recall?

A. (No answer.)

The Court: Let the record show the witness shook his head in the negative. You will have to speak up so the reporter can hear you.

Q. By Mr. Sanders: You haven't any idea from your own personal knowledge how long Mr. Mills took to eat his lunch?

A. I haven't any idea.

Mr. Sanders: No further questions.

Redirect Examination

By Mr. Bertram:

Q. Mr. Alcott, do you know what the scheduled hours were for the graveyard shift?

A. What the hours were?

Q. Yes.

A. 12:30 to 8:00.

Q. And for the graveyard employees was there any scheduled lunch period?

(Testimony of Melville Alcott)

Mr. Sanders: I object to that as too general. Are you including in that Mr. Mills and the other steam engineers?

Mr. Bertram: He testified as to what his understanding was with respect to the engineers. I am asking it generally [58] now over the entire yard.

The Witness: 4:00 to 4:30, I think was the hour of the lunch period as designated by the time department.

Q. By Mr. Bertram: Making a total, then, of seven hours scheduled work? A. That is right.

Q. And do you know how many hours of pay were provided for that work?

A. Eight hours of pay was provided for that on account of it being on the graveyard shift.

Q. Was that true during this entire period?

A. Yes, as far as I know.

Mr. Bertram: That is all.

Recross Examination

By Mr. Sanders:

Q. You testified that they were paid an extra hour on the graveyard shift. Were you in the pay department? What knowledge are you basing that on, Mr. Alcott?

A. General observation is all. I haven't any absolute knowledge of that.

Q. Just from what people told you?

A. Just from what I was told.

Mr. Sanders: No further questions.

Mr. Bertram: That is all, Mr. Alcott.

The Court: Call your next witness. [59]

Mr. Bertram: Mr. Anderson.

B. A. ANDERSON,

called as a witness by and on behalf of the plaintiff,
having been first duly sworn, was examined and testified
as follows:

The Clerk: State your full name.

The Witness: B. A. Anderson.

Direct Examination

By Mr. Bertram:

Q. Mr. Anderson, what is your business or occupation?
A. I am an electrical operating engineer.

Q. Were you employed by Cal Shipbuilding Corporation?
A. I was, yes, sir.

Q. Between October 1943 and August 1945?

A. Yes, sir.

Q. In what capacity?

A. As an operator, compressor operator, electric compressors.

Q. Did you during that period know Thomas C. Mills?
A. Yes, sir.

Q. To your recollection did he, during that period, work in the compressor plant?

A. He worked part time in the compressor plant No. 2. I worked in compressor plant No. 1. He left compressor plant No. 2 and went to the boiler. [60]

Q. The steam plant?

A. The steam plant, yes, sir.

Q. Do you know about what time he left that compressor plant?
A. I couldn't say the dates, no, sir.

Q. Were compressor plants Nos. 1 and 2 identical in operation?

A. No, they are different types of compressors. We have several different types of compressors. One is a

(Testimony of B. A. Anderson)

vertical and one is a horizontal, horizontal compressor. That was a vertical compressor that he operated.

Q. Are you familiar with its operation?

A. Of all that type, yes, I am.

Q. During what shift was that operation performed by Mr. Mills?

A. I think part of it was the day shift.

Q. Was that the shift you were on?

A. No, sir; I was on the swing.

Q. Do you know how many employees were employed on the day shift with Mr. Mills in the compressor plant No. 1?

A. One employee for each plant.

Q. And from your knowledge of the operation of compressor plant No. 1 would you describe its operation, please?

A. Well, the operation is that you have got an [61] electric compressor with a very high voltage, a voltage capable of throwing an arc in there at any time that might burn out the motor, burn out the field. Also you have got the bearings to watch. They might run hot at any time. You can't tell what moment. It only takes a minute when turning up 1,500 to 2,500 revolutions, and with the large load and the size of the compressor, 5,000 cubic-foot compressor, which is an enormous machine, and the oil had to be fed to that throughout all the whole system which, if any system got clogged, it would cause at any time that particular system to burn up and stop or destroy the motor.

Q. Was that compressor—by the way, what was it compressing?

A. Air.

Q. Did that compressor require constant attention?

A. You would have to be there because you couldn't leave the plant. That was our strict rules. We wouldn't

(Testimony of B. A. Anderson)

leave the compressor plant at any time for fear something might happen if we were not there to either put the fire out or shut off in order to see to it that it didn't ruin the machine.

Q. Who issued those rules?

A. Why, them rules come from Mr. Keel and Mr. Alcott, both from Mr. Alcott and Mr. Keel. Mr. Keel was our superintendent and Mr. Alcott was classified as installation assist- [62] ant engineer.

Q. Was there any provision made for relief for lunch periods?

A. No, it wasn't possible. I will tell you the class of men we had. At that time we didn't have men we could call upon that you could go over and leave a piece of machinery of that value with. There were men there that could come in and watch it run but if something happened they wouldn't know what to do, so we stayed at it because we simply didn't want to see the machine destroyed. It wasn't replaceable even.

Q. In the event of some contingency or emergency what was necessary to be done or what was done?

A. For instance, an oil line clogged at any time we immediately—she would run hot and you have to be there to shut it off instead of burning out the complete bearing or throwing the whole shaft down in the motor and let it drop down and burn the motor out. We had to watch the oil system on it constantly, especially on the one Mr. Mills run. That was an old-time machine taken out of a mine and it wasn't dependable. It was called a Norberg.

Q. And in the event of some contingency of that sort did you engineers make the repairs to the equipment?

(Testimony of B. A. Anderson)

A. No, sir; we were not maintenance men. We were maintenance but not classed as mechanics in that trade. [63]

Q. You would then call in a repair man?

A. If we had a breakdown, unless it was something minor like a switch, we—if a switch throwed out we would put it back in but anything of a mechanical nature they would have to bring in a machinist or pipefitter or electrician or whatever class of machine to fix it. We would shut it off immediately and contact the department we wanted to come and make the repairs.

Q. From your knowledge of the operation of Mr. Mills' machine, his compressor, what would you say would be the longest period of time that he might leave that machine unattended?

Mr. Sanders: I object to that, your Honor, as calling for a conclusion of the witness and based on no observations on the witness' part.

The Court: Overruled.

Mr. Sanders: And hearsay.

The Court: You may answer the question.

The Witness: I would like to have the question again.

The Court: Read the question, Mr. Reporter.

(Question read.)

A. We were not allowed to leave the compressor plant at any time. We had to be inside the building from the time we got there and our shift and stay there a continuous shift. The noise, you see, we go a good deal by the smell [64] and the noise in a machine shop. If there is any strange noise we notice it instantly so there was no time—you couldn't tell when a thing would occur. You might go out even for five or ten minutes and leave

(Testimony of B. A. Anderson)

it and nothing happen but you might go out another ten minutes at another time and you come back and you would have a machine completely destroyed. So, you can't say there was any time you could leave the plant and not have our mind and eyes on these machines.

Mr. Bertram: That answers my question. You may cross examine.

Cross Examination

By Mr. Sanders:

Q. How often on your shift, Mr. Anderson, would your machine break down? Several times every day?

A. Oh, no, by no means. Them machines where we operated them might go along for several days without any mishap whatsoever and then again your water system, your oil system or anything could happen several times during any one day. There was no telling what the machines would do. The machines are built sturdy. They stand up very well, but to say you are allowed to leave them, you are not for the fear of something would happen while you were gone.

Q. Was your work in—strike that. Which compressor plant did you work in? [65]

A. Worked in No. 1.

Q. At all times? A. Yes, sir.

Q. And which compressor plant did Mr. Mills work in? A. No. 2.

Q. He worked in No. 2? A. Yes, sir.

Q. Were the machines the same type?

A. No, they were not.

Q. You never worked at any time with the type of machine that was in Plant No. 2?

A. Yes, sir, I did.

(Testimony of B. A. Anderson)

Q. At Cal Ship?

A. At Cal Ship. I relieved down there several times when something happened—the graveyard man didn't show up one time. There was a wreck and another time a man was sick and I had to work 16 hours through and go down there and take care of that machine.

Q. Was that after Mr. Mills had become a steam engineer?

A. I don't—I can't recall, sir. You know them things you can't say the dates or times. I can't recall but there were, I would say, five periods that I believe I done that.

Q. You are quite sure Mr. Mills worked in the [66] compressor plant the latter part of 1940?

A. I can't recall what time the boiler went in. He went to the boiler but what date the boiler went in I wouldn't know, whether it was the first part of the year or not. You see, I worked there from 1942 to 1946—the latter part of 1946.

Q. And the provisions were the same in the compressor plant. You ate your lunch during the shift, is that right?

A. Yes, sir.

Q. Had you ever done similar work before you went to work at Cal Ship?

A. Yes, sir; I served my time as a boy in electrical engineering and then I left it for a period of time and I was in the last war operating as an engineer.

Q. How many years, approximately?

A. I will say altogether 15 years.

Q. Isn't it true that it is generally the practice of an engineer who eats his meal by his machine—strike that. Isn't it true that an engineer does eat his meals or his lunch by his machine?

(Testimony of B. A. Anderson)

A. He is in among there and around there to see that nothing can happen.

Q. And you would have lull periods in the compressor plant too, wouldn't you?

A. Why, yes, you could take your lunch and have a desk. [67] We had a desk in the compressor plant. You could take your lunch and if a noise happened you jumped up and went and attended to it. If you had to shut off the machine you shut it off, or if the oil line was clogged you would have to get right to work on it. We were running, as I stated, down there short of air all the time and the result was we were on overload—what they call overload and they didn't have enough blowers to cool the double bottoms and they opened the hoses and they were drawing on us and dragging the pressure down, and, of course, a machine isn't like a boiler. It only has a certain amount of capacity. Some machines have 1500 cubic feet and some 2500 or 3000 or 5000. That means per minute.

Q. And it was your understanding when you went to work in the compressor plant that you were to work the swing shift and to have your lunch during that shift, isn't that right?

A. During the eight hours, yes, sir.

Q. But you would have no scheduled lunch period?

A. No, we didn't have no schedule.

Mr. Sanders: No further questions.

Redirect Examination

By Mr. Bertram:

Q. Mr. Anderson, did you also work the day shift at anytime? [68]

A. I worked day shift one time for two weeks.

(Testimony of B. A. Anderson)

Q. And was that during this period?

A. Oh, yes. I relieved a man who was on the day shift.

Q. What were the hours of the day shift?

A. The day shift was eight o'clock to 4:30.

Q. Any scheduled time for lunch for the yard in general?

A. The yard in general but not in the compressor plant, the oxygen plant or the steam plant.

Q. Now, during that period that you were on the day shift how many hours of elapsed time did you work?

A. On the day shift?

Q. Yes.

A. I would say the last two weeks.

Q. I mean how many hours each day shift?

A. I worked a half hour overtime every day on the day shift.

Q. And how many hours of pay did you receive?

A. Got straight eight hours.

Q. And will you describe the situation with regard to the pay when you were on the swing shift?

A. We worked eight hours.

Mr. Sanders: I don't see that the swing shift is relevant here. I will object to any testimony on that. The plaintiff was never on the swing shift during the period [69] in issue—the deceased, rather.

The Court: When were you on the swing shift, Mr. Anderson?

The Witness: From 1942, February 2nd, 1942, until November 2nd, 1946.

The Court: That was in the compressor plant?

(Testimony of B. A. Anderson)

The Witness: Yes, No. 1, yes, sir. I am an electrical compressor operator.

The Court: I don't quite understand your testimony about working a half hour overtime and getting paid for only eight hours.

The Witness: Well, wait. Maybe I am mistaken. I might have made a mistake in my statement there. No, that was the day shift—I stayed there from eight o'clock until 4:30 in the afternoon and he was supposed to have had a half hour off for lunch, you understand, as the rest of the yard had which—the general workmen had, but they didn't get it off because they had to stay there in the plant.

The Court: When would the shift that succeeded that shift go on duty?

The Witness: 4:30.

The Court: Did you get any time or overtime for that half hour?

The Witness: Not at the time we didn't, no, sir, not that I know of. I never heard of it being so. [70]

The Court: You say "not at the time." What do you mean by that?

The Witness: I never heard of them getting any more than the straight eight hours in that plant.

The Court: How about yourself? Did you ever get any more?

The Witness: No, sir. I worked straight eight hours, straight through, but you see the swing shift was granted a half hour for working swing shift and graveyard shift was granted an hour for working graveyard. Now, that half hour would allow for the lunch hour in a general yard, but in the compressor plant and in the steam plant

(Testimony of B. A. Anderson)

and in the oxygen plant we stayed with our plant the whole period of time.

The Court: Would it have been a practical plant usage to have had a standby man to relieve the engineer?

The Witness: Well, under the circumstances, with the shortage of engineers of that type, I don't think it would. There was no relief there. There was no day off or anything like that and we worked the rotation system in there. We worked five days straight for 12 weeks and then we were off two days and then we come back on and then we worked a 12-day period without time off.

The Court: You made that arrangement between yourselves?

The Witness: No, no, that was a company rule. They put a rotation rule in there. [71]

The Court: The rotation was between the men who were working there?

The Witness: No, it was the company that set up the rotation.

The Court: Well, how could it have been a practical plant usage to have had a standby man?

The Witness: Well, if they had an extra engineer he could have relieved in one plant for luncheon. You would have to have two or three; one for the steam plant and one for each compressor plant to relieve a half hour. That would have been three men on each shift.

The Court: Three men on each shift to relieve three working men?

The Witness: To relieve three men for a half hour.

The Court: Would you pay him a day's wages or would you give him different compensation for that?

(Testimony of B. A. Anderson)

The Witness: Well, if they had a man—I will tell you the union controlled that pretty well. If a man was an electrical engineer and another man a steam engineer and another man was a crane operator, well, he was classed as that. He couldn't be taken off of this piece of machinery and put on that piece of machinery even though he was capable of operating it. They don't allow that in the unions. The unions control the job.

The Court: Was there any agreement by the unions during [72] this period with reference to that?

The Witness: No, sir.

The Court: They were not working on a union basis?

The Witness: We were working on a union basis altogether, yes, certainly.

The Court: Was there any agreement by which there was a relief at all?

The Witness: No, there never was no agreement.

The Court: If you worked on the union basis—

The Witness: But the union never—

The Court: Wait a minute.

The Witness: Excuse me, judge.

The Court: If we both talk at once no one will understand what we are saying. If there was no collective bargaining agreement then there wasn't any what you call union understanding, for relief during the period that we are talking about, was there?

The Witness: Well, we had never—we all belonged to the union and collective bargaining—I don't know just how you want me to express that. We didn't have no understanding as to us fellows working.

The Court: In any event there was no relief?

The Witness: That is correct.

(Testimony of B. A. Anderson)

The Court: Granted you?

The Witness: That is correct. [73]

The Court: I am coming back again to that question of mine, Mr. Anderson: Do you think as a practical plant usage and practice it was feasible to have had relief?

The Witness: No, I do not. I don't feel there should be.

The Court: That is all. Call your next witness.

Mr. Bertram: Mr. Hill.

FRANK V. HILL,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Frank V. Hill.

Direct Examination

By Mr. Bertram:

Q. Mr. Hill, what is your business or occupation?

A. I am a lubrication engineer.

Q. During the period between October 1943 to August 1945 were you employed at Cal Shipbuilding Corporation?

A. Yes, sir.

Q. Continuously during that period?

A. Continuously, yes, sir.

Q. Do you know one Thomas C. Mills, employed as an engineer?

A. Tom started to work for me when he first started [74] to work in the yard.

(Testimony of Frank V. Hill)

Q. That was prior to the commencement of the period which I mentioned, is it not?

A. I don't remember the date that Tom came to work but he came to work for me as an apprentice engineer and later I transferred him over to an engineer.

Q. Where did he work when he was transferred as an engineer?

A. In the compressor plant.

A. In the compressor plant.

Q. And were you familiar with the operation of the compressor plant?

A. Yes, sir.

Q. Will you describe the operation of the plant in which Mr. Mills worked?

A. Well, this particular plant that he worked in was a large machine, as you have heard discussed before. I think they got it from a mine down in Arizona. As soon as that was installed I believe Tom went direct from my department over there as an operator.

Q. What did he have to do to operate that compressor?

A. Well, you have to—that type of machine you have to watch all the time. There is several things that you have to watch continuously—your oil system, your water system, and as Mr. Anderson testified a while ago, a man becomes familiar with the different sounds and noises in a [75] plant like that and can immediately tell what it is and where it is, usually. And a man has to be there continuously as long as the machine is in operation.

Q. What shift did you work on, Mr. Hill?

A. Well, I was on call 24 hours. I spent most of my time on the day shift, however. I worked—usually I would stay over one or two days a week on the swing shift for a certain number of hours or I would go home

(Testimony of Frank V. Hill)

and come back say at ten or eleven o'clock and maybe stay there until two o'clock in the morning. Some mornings I would get up at two o'clock in the morning and go over the graveyard shift. In other words, I had about 200 men under my supervision in my department and in order to see what was going on, why, it was necessary for me to be over there.

Q. What was your department?

A. I had the lubrication department. We lubricated everything in the plant.

Q. And what was the relationship between your department and these engineers?

A. During the war, at the early part of the yard, when they would need a man they would send direct to the union for a particular type of man because they were available at that time. In other words, a crane operator or compressor operator or an acetylene plant operator they could order those direct from the union and get them. However, the [76] time came that you couldn't do that and we had to train a lot of the men—the majority of the crane operators.

I looked in my books before I left down there and I counted the number of men on the swing shift that I had transferred from my department to the crane department as crane operators. That was just on the one shift. I was curious as to how many men I had transferred and I looked it up and there was 1,500 men on swing shift alone that I had transferred to crane operators. Now then, my department was more or less a clearing house for these men that came in. In other words, a man would come in to my department. He may not have had any experience in that line of work

(Testimony of Frank V. Hill)

at all. On the other hand, there were other men that came in that were qualified engineers or crane operators or various tradesmen, and I tried to direct those men into the positions that they were best qualified for because men were scarce at that time.

Q. What was your job title, Mr. Hill?

A. Lubrication engineer.

Q. And in that capacity you trained Mr. Mills during his apprenticeship, is that correct?

A. Well, Tom had the preference of training as a crane operator or going into this other line of work, compressor operator or acetylene plant.

Q. Did you observe him at work in the compressor [77] plant at any time?

A. Yes. The plant was only, just about, oh, 75 feet from my office.

Q. Did you have any supervision over him?

A. Not after he was transferred over to the compressor plant—steam plant.

Q. Did you observe the way in which he performed his duties in the compressor plant?

A. Yes. I was in there, in and out of there. I went by there every day.

Q. From your observation will you describe how he performed those duties with respect to the amount of attention he gave to the equipment and so forth?

A. Well, I never saw Tom away from the plant and I would say that he was a very conscientious worker. The only time that I ever saw him away from the plant would be to come over to my office and say, "Frank, I need a barrel of oil" or, "I need some rags," or something like that.

(Testimony of Frank V. Hill)

Q. Do you know whether or not he took time off for lunch while on duty as a compressor operator?

A. No; they ate their lunch sometime during the shift. We had no designated time for the lunch period. I have been in lots of plants where the operator would say, "Well, I have got to eat my lunch early because I have to work through the noon hour on some minor adjustment," or something in the [78] plant.

Q. I notice you called Mr. Mills Tom. Did you know him pretty well?

A. Yes; he worked for me for, I don't know—I would say about a year, I would imagine.

Q. Did you ever have occasion to try to eat lunch with him while you were there?

A. No, I didn't bring my lunch to the yard.

Q. Did you ever observe him at work on the compressor plant? A. Yes.

Q. Excuse me, on the steam plant? A. Yes.

Q. And will you describe what you know of his work on the steam plant?

A. Well, he was transferred down to the steam plant. I don't remember the dates. I know that he was there because I saw him.

Q. How often did you see him at the steam plant?

A. I would say at least once a week.

Q. That was during the graveyard shift?

A. Sometime during the graveyard shift. It could have been the first part of the shift or the last part of the shift, because I was called over there quite a bit of the time. I never knew when I would have to be called back. [79]

(Testimony of Frank V. Hill)

Q. And will you describe what you observed of the manner in which he performed his work?

The Court: I don't think there is any question about the manner in which he performed his work. The question was as to the necessity or compensability of a lunch period.

Mr. Sanders: That is the only issue.

The Court: And I am afraid this is cumulative.

Mr. Bertram: It is cumulative, your Honor. Let me ask you this, Mr. Hill.

Q. By Mr. Bertram: In your capacity as lubricating engineer in charge of some 200 employees, did you have charge of employees on all three shifts?

A. Yes, sir.

Q. And are you familiar with the hours which they were scheduled to work?

A. Yes, sir.

Q. And what hours was the graveyard schedule?

Mr. Sanders: I object to that question. He is asking now a question about the employees on the graveyard shift. It has nothing to do with the employees in the engineering department.

Mr. Bertram: I will ask a preliminary question then.

Q. By Mr. Bertram: Mr. Hill, in your capacity as supervisor over these 200 employees, were you familiar with the schedule of hours of all the employees in the yard? [80]

A. Yes, sir.

Q. Were they the same for all employees on the graveyard shift?

A. That is right.

Q. Now, what were the hours scheduled for the graveyard shift employees?

A. 12:30 to 8:00.

Q. 12:30 in the morning until eight in the morning?

A. Yes, sir.

(Testimony of Frank V. Hill)

Q. Was any time scheduled for lunch?

Mr. Sanders: Are you asking as to all employees?

Mr. Bertram: All employees in the yard.

The Witness: The lunch period was from 4:00 to 4:30.

Q. By Mr. Bertram: Making a total of how many hours scheduled for work during that shift?

A. I think it figures seven hours total.

Mr. Sanders: I will concede it is seven hours.

Q. By Mr. Bertram: Do you know how many hours of pay all employees were paid for that seven hours of work?

Mr. Sanders: I object to that as calling for hearsay testimony on this witness' part. He was never on that hourly rate and he wasn't in the payroll department.

The Court: I did not hear the last part of your objection.

Mr. Sanders: I object to that as calling for hearsay [81] testimony from this witness. According to his testimony he was never in the payroll department and he was never on an hourly rate.

Mr. Bertram: I asked the preliminary question, whether he was familiar with the schedule.

The Court: Yes, that question may be answered. Objection overruled. Read the question, Mr. Reporter.

(Question read.)

The Court: Can you answer the question yes or no?

The Witness: They were paid eight hours.

The Court: No, no, you must answer that question yes or no.

The Witness: What is the question?

The Court: Read the question.

(Testimony of Frank V. Hill)

(Question read.)

The Witness: Yes.

Q. By Mr. Bertram: Will you state how many hours of pay? A. Eight hours.

Mr. Bertram: You may cross examine.

Cross Examination

By Mr. Sanders:

Q. Just to clear something up here, Mr. Hill, you stated there was a scheduled luncheon hour for all employees in the shipyard on the graveyard shift? [82]

A. That is right.

Q. Didn't you also state as to the engineers in the steam plant and compressor plant that they had no scheduled lunch hour—they were to eat during the schedule?

A. No, I heard it discussed several times. A relief was not available to give those fellows any relief.

Q. But in your direct testimony I understood you to say they would eat sometime during their shift?

A. During their shift.

Q. You gave an example that Mr. Mills one day, as you recall, would eat lunch early because at noon he was going to have to repair something?

A. That is right.

Q. And that was when Mr. Mills was on the day shift? A. That is right.

Q. So at least as to those engineers they did not have a scheduled lunch hour? A. No, they did not.

Q. Now, were these employees, these engineers in the compressor plant and steam plant and acetylene plant, were they all union employees? A. Union?

Q. Yes. A. Yes, sir.

(Testimony of Frank V. Hill)

Q. And isn't it true the union had representatives [83] in the yard at all times? A. Yes.

Q. Now, your lubrication supervisory duties included all equipment in the shipyard, didn't it?

A. That is right.

Q. And you were thoroughly familiar with the mechanics of the steam plant operation and the compressor plant operation? A. That is right.

Q. Now, isn't it true that in both of those plants there would be lull periods—what I mean by that, a man could sit down for 10 or 15 minutes?

A. Yes, there are times in almost any plant.

Q. And from your own observation you have seen these men eating their lunch in their offices in those plants, haven't you, during the shift? A. That is right.

Q. From your knowledge how many employees did you have? A. Around 200 on the average.

Q. Do you know of any other groups of employees down [84] at the shipyard that had no scheduled lunch hour that were hourly employees?

A. In my department there were certain pieces of equipment that we had to lubricate during the lunch period. For instance, in the plate shop the bridge cranes. I had the fellows, a crew that went through there. They ate their lunch ahead of time or after. It didn't make any difference to me.

Q. They were not permitted to—well, I will withdraw that.

The Court: He said they were not permitted to eat during the scheduled lunch hour. That was the question and the witness answered "No." You mean they were not permitted to eat because it was not practical?

(Testimony of Frank V. Hill)

The Witness: That is right, we worked out that plan.

The Court: You do not mean they were forbidden to eat their lunch?

The Witness: They were not forbidden a lunch period.

Q. By Mr. Sanders: Prior to working at Cal Ship did you previously work with compressor plants or steam plants?

A. Yes; I spent five years at Boulder Dam. I have been around machinery of all types all my life.

Q. There was it the practice for the engineers to remain with their equipment during their shift?

A. That is right. [85]

Q. And eat their lunch right there?

A. Yes. In that type of employment a man doesn't leave the plant. He is not—it is just an unwritten law that he is there at all times.

Mr. Sanders: No further questions.

Mr. Bertram: That is all I have.

The Court: We will hear the rest this afternoon, gentlemen, at two o'clock.

(Whereupon, at 12:00 o'clock noon, a recess was had until two o'clock p. m. of the same day.) [86]

Los Angeles, California, Thursday, May 8, 1947, 2:00 P. M.

The Court: You may proceed, gentlemen.

Mr. Bertram: We have some exhibits to offer. I think we should do that by stipulation—the change of status, Mr. Sanders.

In making an offer of these records concerning the status of Mr. Mills, while he was employed by Cal Shipbuilding Corporation, I wish to make this statement. These documents which are stapled together, are a part of the records which it is desirable from the standpoint of, I understand the Maritime Commission, to be kept together.

A portion of these documents is not material to the case because they concern matters prior to the period involved. But in order to keep them together it has been indicated it would be preferable to offer the entire lot.

The Court: You can turn one down indicating those which ante-date the first date of the time in question in this case.

Mr. Bertram: Yes, I will do this. There is a change of rate or occupation slip numbered 17194 and bearing the date 6-24-42. I will turn that one down to indicate that everything above that change of rate occupation slip is or concerns matters involved in a period in this lawsuit.

The Court: Very well, if that is the understanding. [87]

Mr. Sanders: I have no objection to that with the one addition, your Honor, that the rates of pay and the periods prescribed in our stipulation will govern if there is any conflict between that and this record here.

The Court: Yes, certainly.

Mr. Bertram: I will agree to that. We will be bound by our stipulation. This will be offered then as Plaintiff's Exhibit 1.

The Court: Received and marked filed.

(The document referred to was marked as Plaintiff's Exhibit 1, and was received in evidence.)

Mr. Bertram: With that the plaintiff rests, your Honor.

The Court: You may proceed, Mr. Sanders.

Mr. Sanders: Call Mr. Bergemann.

RUSSELL A. BERGEMANN,

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Russell A. Bergemann.

Direct Examination

By Mr. Sanders:

Q. You are now an officer of the California Ship-building Corporation? [88] A. Yes, sir.

Q. And you have been employed by them since when?

A. Since it started, February 1941.

Q. And in what capacity were you occupied in 1943?

A. I was in charge of industrial relations.

Q. Just briefly what did that consist of?

A. All the personnel phases—hiring, labor relations, recreational facilities and all the various phases of personnel.

Q. You worked in liaison with the various unions representing the crafts and also the maritime Commission?

A. Yes. I represented the company and handled grievances with the union and contract negotiations.

Q. Were these operating engineers who worked in the steam plant and acetylene plant and compressor plants, were they represented by any union?

A. They were represented by the International Union of Operating Engineers.

(Testimony of Russell A. Bergemann)

Q. And at any time was there any point raised, in 1943 up to 1945, about the men not being properly paid for their shift, their working shift?

Mr. Bertram: To which we object on the ground it is not material or relevant to any of the issues in this case. It has been held in numerous cases that the failure to object would not bar or preclude a plaintiff from claiming [89] pay for hours which he worked and for which he was not paid.

Mr. Sanders: There are also numerous cases—I concede that is true but I think there are also cases taking the other position, but that does shed some light on the real facts in the case.

The Court: These cases are individualistic and it is the circumstances and facts of each case that are material. Objection overruled.

The Witness: No; there was never objection on the part of the union to that.

Q. By Mr. Sanders: Were you also the representative that undertook conferences and consultations with individual employees that had some objection with relation to their working arrangements?

A. Well, if there were any individual employees that came to me I would always refer them to their business agent because I wouldn't—we had a union contract and you have to—

Q. Your best recollection, did any of the operating engineers ever come to you about their working arrangement?

A. No, never.

Q. You are also an officer of the Cal Shipbuilding Corporation, Mr. Bergemann?

A. Yes.

(Testimony of Russell A. Bergemann)

Q. And you are familiar with the contracts under [90] which the corporation worked in connection with the U. S. Maritime Commission in producing ships?

A. Yes.

Q. And you were a party signatory to those contracts?

A. Well, I signed some of them as an officer or assistant secretary.

Q. And for each new type of ship that was made up did they make up a new contract?

A. Well, they would either—at least they would make an addendum to the present one if there were any changes.

Q. Provisions other than the type of ship that was going to be made and the compensation therefor were the same in all the contracts?

A. They were from the beginning which I think—I think the first one was signed in about April of 1941 and they were all the same up to March 1st, 1945, when we switched from a cost-plus fixed fee contract to a form of lump sum contract.

Q. Where are the originals of those contracts?

A. We have counterparts in our office.

Q. Where are the other copies, the other originals?

A. I imagine the Maritime Commission has them.

Q. Do you have copies of any of those contracts here?

A. I have a copy of one of them—one of the typical [91] contracts.

Mr. Bertram: If the court please, I think I should not take time now to examine this rather bulky document. If it is being offered may I reserve an objection and make a motion to strike if I later, on examination, find I feel it is immaterial?

The Court: Yes.

(Testimony of Russell A. Bergemann)

Mr. Sanders: As I understand it, though, you have no objection to the copy going into evidence rather than the original?

Mr. Bertram: No, I won't make an objection on that score.

Mr. Sanders: May I have this marked and offer it in evidence?

The Court: Received subject to the objection that may hereafter be interposed. If the objection is deemed to be well taken the ruling will be vacated and it will be sustained and the instrument excluded. It is received tentatively on the aforesaid ground and ruling.

(The document referred to was marked as Defendant's Exhibit A, and was received in evidence.)

[Defendant's Exhibit A will be found at page 135 of the Transcript of Record.]

Q. By Mr. Sanders: During the operation of the shipyard did the Maritime Commission ever exercise any acts in relation to the hiring or discharging of employees down there, Mr. Bergemann? [92]

A. Well, they had, I think under the contract, a right to, but actually I cannot recall any specific instance in which they ever told us we couldn't hire somebody or had to fire somebody.

Q. Would they ever make recommendations to you with respect to the discharge of some particular employee?

A. Well, I think on one or two occasions we did discharge employees when they asked us to, but it was very seldom. After all, we were supposed to be running the place.

(Testimony of Russell A. Bergemann)

Q. The point I wanted to bring out is that it was done although the situations were very small in number?

A. Yes, it was done.

Q. And did they have any industrial relations officers in the yard?

A. Yes. They had a man there at the last, about the last three or four years.

Q. About the "last three or four years." How far back?

A. I mean from 1942 on, I guess.

Q. And what was this function?

A. Oh, he looked after the—you see, we had to get all our rates approved by the Maritime Commission and they had various procedures that we had to follow for giving increases in rates to certain crafts and if you wanted to [93] spend any money for industrial relation matters oftentimes you would have to get the approval of the local man and then he would send it on up to Oakland to get the final approval. They had a system of up-grading welders. Each time you up-graded a welder that you were teaching how to weld you would have to get the approval of the local man.

Q. You mean the Cal Ship Company not of its own accord promote a welder to a higher wage classification without the Maritime Commission's approval, is that correct?

A. We made all the welders in the county, I think, and you take a welder, a trainee, and by the time you—before you could get him up to the journeymen's rate they had what they called an up-grading committee, I think, and this committee had to approve the up-grading and this Maritime representative was the chairman of the committee.

(Testimony of Russell A. Bergemann)

Q. Besides the industrial relations officials of the Maritime Commission, what other officials did they have in the yard?

A. Oh, they had all the—all the work was inspected by the Inspection Department and then they had a large accounting staff where all the money that we spent had to be approved by them before we would be reimbursed. There were probably four or five hundred representatives of the Maritime Commission in the yard.

Q. They would approve this accounting—this [94] accounting section would approve the requisitions for materials of Cal Ship and purchase orders?

A. Not the accounting section. They had another group that approved all the requisitions for purchases before we could purchase anything. I forget what they called them.

Q. Was the industrial relations official of the Maritime Commission also a party to negotiations with the unions in regard to working conditions?

A. Well, not for our yard individually but our union agreement was a coast-wise agreement. All the yards that had an A. F. of L. contract had the same contract and we would have coast-wise meetings and the Government and labor and management were the three parties to all the negotiations. After all, it was the Government's money so they had to approve any increases in rates before they were granted.

Mr. Sanders: These contracts, your Honor, unless counsel wishes to object, I would like a concession that this represents, as far as the elements that might be material to the issue of engaging in interstate commerce, are

(Testimony of Russell A. Bergemann)

all embodied in the exhibit so we will not have to bring all the contracts in.

The Court: Is that the point of the proffer here of Exhibit 1?

Mr. Sanders: Yes. [95]

The Court: On the issue of interstate or foreign commerce solely on that issue.

Mr. Sanders: On the issue and independent contractor and all the various phases.

The Court: There was not a separate instrument for each ship, was there, Mr. Bergemann?

The Witness: In all there were six different contracts.

The Court: But they pertained to a group?

The Witness: Each one pertained to a group of ships.

The Court: But as each ship was fabricated and assembled and launched there wasn't a separate contract for that ship?

The Witness: Oh, no. For instance, one of the contracts covered 109 ships.

The Court: This is a specimen contract of what group? Exhibit 1?

The Witness: This is a copy of one of the cost-plus fixed fee contracts that we had.

The Court: Any further examination of this witness?

Mr. Sanders: No, I have no further questions.

Mr. Bertram: Mr. Bergemann's testimony that the portion of the contract relative to the point on which this is offered is the same as, or substantially the same as, the other six. I would make no objection as to your not offering the other six or the other five or whatever they are. [96]

(Testimony of Russell A. Bergemann)

Mr. Sanders: You can examine him on that if you want.

The Court: What was the situation there, Mr. Bergemann? What change was there in the contracts except as to the specification for a certain group of ships?

The Witness: The only change, your Honor, was commencing on March 1st, 1945. Instead of building the ships on a cost-plus fixed fee basis, we built them on a lump sum basis.

The Court: But in each case the money was paid by the national treasury, was it not?

The Witness: That is right. The only difference was that after March 1st, 1945, if we said we were going to build a ship for an X amount of dollars, if we didn't build it for that amount we had to pay the difference, whereas before no matter how much it cost, the Government paid the bill.

The Court: Is there a provision in this contract, Exhibit 1, with respect to the settlement of claims made by workers that were not made during the active operation period of the California Shipbuilding Corporation?

The Witness: There isn't any specific clause of that type there. There is just a clause in here that we will be reimbursed for all wages.

The Court: In other words, that is a continuing covenant or condition of the contract? There is no time fixed for the adjustment of those claims? [97]

The Witness: Well, no. The way that is handled, your Honor, right now, our general manager is in Washington settling these contracts and there will be—finally we will end up with a more or less omnibus contract to take care of every contingent claim.

(Testimony of Russell A. Bergemann)

The Court: But the cases that are being filed here now and were not filed until relatively recently, those cases as they are settled by the courts or adjusted by the litigants, are taken up *seriatim* in Washington and settled, is that correct?

The Witness: They are. When we are sued our attorneys notify the Maritime Commission and they in those cases advise us to go ahead and defend it and then they reimburse us for whatever the judgment is.

The Court: You say they reimburse you?

The Witness: I mean the Maritime Commission. Of course they could refuse to reimburse us if they thought that the loss was through our negligence. In that case of course we would have to go through the arbitration procedure in the contract.

The Court: I am speaking about these so-called wage and hour cases.

The Witness: For the most part, to my knowledge, we have always been reimbursed.

The Court: In other words, the Government is paying [98] the bill?

The Witness: That is right.

The Court: Instead of this being an action by an individual against the California Shipbuilding Corporation in reality it is reaching into the public treasury of the United States?

The Witness: That is right.

The Court: For the amount of recovery plus the liquidated damages that the Fair Labor Standards Act provides, plus attorney fees and plus the costs if they are allowed?

The Witness: That is right, everything.

(Testimony of Russell A. Bergemann)

The Court: Cross examine, Mr. Bertram.

Mr. Bertram: Before beginning my cross examination we would like to enter for the record an objection to the line of questioning and answers concerning the source of payment, if any, of these claims if they are found to be justified.

Cross Examination

By Mr. Bertram:

Q. Mr. Bergemann, you stated that the United States Maritime Commission played no part actually in hiring any employee? A. That is right.

Q. Cal Shipbuilding Corporation maintained its own facilities for recruiting and putting employees on the payroll? [99] A. Yes, that is right.

Q. And those employees were all paid with checks issued by the Cal Shipbuilding Corporation as far as their wages were concerned? A. That is right.

Q. The time keeping department, the payroll department was all managed by Cal Shipbuilding Corporation?

A. That is right, we did. We managed the plant.

Q. Was the Cal Shipbuilding Corporation the lessee of the premises, the real property?

A. We are named the lessee. Of course it was all under the direction of the Maritime Commission and they have certain rights there—they had certain rights in the lease that pertained to the Maritime Commission. For instance, the—when you get a lease from the Harbor Department you cannot assign it without the consent of the Harbor Department or sublet it, and the Maritime Commission had the right to come in and throw us out and put somebody else in there under the lease.

(Testimony of Russell A. Bergemann)

Q. If it felt you were not performing your obligation under the contract? A. Yes.

Q. I don't want to pursue that further, but let me ask you if that situation is covered or touched upon in this contract that has been offered in evidence? [100]

A. Well, there is—naturally there is a cancellation clause.

Q. I mean the situation with regard to the lessee and lessor relationship between Cal Shipbuilding Corporation and the Harbor Department?

A. No, not in this contract. We had separate contracts for the construction of the yard that provided that before we could start construction we would have to submit a lease of the premises to the Maritime Commission which was acceptable to them, but that is on what we call the facilities contract rather than the ship contract.

Q. Did the defendant corporation erect the facilities there?

A. Yes, we erected them on the same basis, on a cost-plus a fixed fee contract. The fee was only a dollar but the cost was reimbursed.

Q. And the company ordered all its own raw materials?

A. No. We did just a minor amount of purchasing—that is, a small percentage of the purchasing. All the steel and all the propulsion machinery and—well, all the big structural items were bought by the Maritime Commission. We didn't have anything to do with it.

Q. And brought to the plant?

A. That is right.

Q. By whom? The corporation or the Commission? [101] A. The Commission would ship it in.

(Testimony of Russell A. Bergemann)

Q. And what materials did the corporation purchase and acquire?

A. We purchased the smaller items like—well, we purchased a number of them but, for instance, like office supplies and nuts and bolts and expendable tools. Things like that we purchased subject to the approval of the Maritime Commission. We made those purchases but these other things I am talking about they were all done away and apart from the yard. They would purchase something in Washington and we would get a copy of the purchase order and we would know it was going to come sometimes.

Q. The things you are speaking of now are they the pre-fabricated portions of the ships?

A. No, no, the steel—just the sheets, the plate steel and then some of the larger items like masts and, of course, the propulsion machinery and the big items that go in to make up the ship, because after all, we were just one yard building the same type of ship that was built in a number of other yards so they would buy for the whole bunch.

Q. We have been discussing here during this lawsuit the question of work during lunch hours by certain engineers. Did the U. S. Maritime Commission Industrial Relations representative have that situation called to his attention at any time to your knowledge? [102]

A. Not to my knowledge.

Q. Do you know whether he had anything to do with the scheduling of work for those engineers?

A. No. He didn't have anything to do with that after we were managing the plant. He couldn't tell us how to manage it or else there would have been no point in paying us a fee if they are going to tell us how to do it.

(Testimony of Russell A. Bergemann)

Q. In other words, the entire management of the plant and the supervision of employees and arrangement of their working hours was done by the corporation?

A. That is right. But always subject to the approval of the Maritime Commission. For instance, we couldn't work anybody overtime unless we got their approval.

Q. Was that approval obtained beforehand?

A. Well, it was supposed to be.

Q. As a matter of practice that was not always the case?

A. As a matter of practice it was always the case because if we didn't get the approval beforehand we would have a difficult time being reimbursed.

Q. There were occasions, were there not, though, when employees were required to work overtime and it was just not possible to obtain prior approval of the United States Maritime Commission?

A. That is right. Naturally in instances like that, [103] for instance if something broke down or there was an emergency of some kind it would have to be worked and—

Q. In those cases you would get approval subsequently, would you not?

A. Yes, sir, if we could justify it we would get reimbursed.

Q. Then the Maritime Commission's participation, if any with your hiring and firing, was confined to security purposes only, isn't that correct? A. (No answer.)

Q. Do you understand what I mean?

A. Yes, I think I do. That is true. There are certain limitations in the contract. We couldn't hire anybody who wanted to overthrow the Government or we

couldn't hire any convicts—any convict labor. That is in the usual Governmental form contract. I guess you are familiar with it.

Q. Based upon your knowledge and experience in this personnel work during the war, could you tell us whether or not these provisions were pretty much uniform throughout all cost-plus fixed fee contracts?

A. Yes. Of course that one on overthrowing the Government, that was Public Law No. 75, or something. You had to get a prospective employee to sign an affidavit and that was the law of the land. [104]

Mr. Bertram: I have no further questions.

Redirect Examination

By Mr. Sanders:

Q. The title to all of the buildings and facilities in the shipyard was in the United States Government, was it not?

A. Every title to everything.

Q. And on the parts or supplies that the shipyard itself ordered, the contract provided the title was vested in the United States at the time they were ordered?

A. That is right; even if they weren't in the yard.

Mr. Sanders: No further questions.

The Court: Weren't a good many of the facilities acquired by the exercise of the right of eminent domain—condemnation?

The Witness: You mean the land?

The Court: Land and various walk ways and—

The Witness: Yes, we did acquire some of the fringe or, well the walk way, the ferry landing and a few things like that were condemned. The leasehold interest was condemned by the Government and then there is a provision of the Code that gives them the right to condemn machinery, which they did.

(Testimony of Russell A. Bergemann)

The Court: A certain portion of a lumber yard was acquired? [105]

The Witness: Yes. That was in connection with our taxi-landing.

The Court: You said in your direct examination that you had a union contract. What did you mean by that? I assume that was during the period involved.

The Witness: Well, on May 27th, 1941, we signed what is known as the Pacific Coast Master Agreement, which is a uniform agreement containing certain standard previously agreed to between the Government, management and labor, and also provisions that were the result of collective bargaining between management and labor which covered everybody, all of the crafts in the shipyard. There were 14 different unions signatory to the agreement.

Q. When was that first collective bargaining agreement incorporated in any contract with the Cal Shipbuilding Corporation?

The Witness: Do you mean when we first signed it?

The Court: Well, my recollection is from other cases that there was a certain period when there was no collective bargaining agreement.

The Witness: Well, that was only from the period when we started the yard, when the first pile was driven, which was about the 30th of January in 1941, until May 27th, 1941 when it was signed.

The Court: My recollection is, Mr. Sanders, that in [106] the Baker case there was a period during which these disputes were settled by the terms of a collective bargaining agreement.

(Testimony of Russell A. Bergemann)

Mr. Sanders: The witness can explain that, I believe, your Honor.

The Witness: I think my statement was a little too general. The guards agreement was not signed until maybe in 1944.

The Court: That only applied to the guards?

The Witness: Yes, sir. The office workers signed at a later date. This agreement of May 27th, 1941 that I have reference to covered the crafts in the yard.

The Court: This particular work in which Mr. Mills was engaged had been covered at all times?

The Witness: Yes; that was covered by the blanket agreement.

The Court: All the ships that were fabricated and assembled and launched during the relevant period were utilized by the Navy as weapons, were they not?

The Witness: Yes; to carry cargo to our Allies and for ourselves, and also we built some troop transports.

The Court: Well, troops are not transported ordinarily for commerce.

The Witness: No.

The Court: It was a war activity essentially? [107]

The Witness: Essentially, yes.

The Court: In other words before the war brought on the cooperative activities of the Government through its agencies, the Cal Shipbuilding Corporation was a unit, a small unit and of relatively small importance?

The Witness: Well, it didn't even exist. It was organized merely to build this yard for the Government and build the ships a little before the war started, but it was certainly done with that in mind.

(Testimony of Russell A. Bergemann)

The Court: Now, you said that the contracts similar to the instrument marked Exhibit 1, were cost-plus a fixed fee which you stated to be one dollar?

The Witness: No, the contract for the construction of the yard as distinguished from the contracts for the construction of the ships was a fee of one dollar.

The Court: But we are talking about Mr. Mills' work in the construction of ships.

The Witness: That is right—well, I brought that—that came up in one of my answers to Mr. Bertram's question regarding the lease of the land.

The Court: So in consideration of the contract there was not a fixed fee of one dollar, but a fixed fee of a specified percentage on the cost price?

The Witness: No, not percentage. They were fixed in dollars but they were a good deal more than one dollar. [108]

The Court: There would not have been any profit if it were not for that. Now, coming to the question which I think may be relevant in all of these cases, but I do not know whether it has been explored extensively enough to determine it, but the Maritime Commission was the representative of the Government that was inspecting everything that was done in the shipyard?

The Witness: That is right. Every bit of work was inspected by a Maritime Commission inspector.

The Court: Weren't most of those inspectors officers in the Navy or in some other branch of the Maritime Governmental activities?

The Witness: Yes. For instance, as you probably know, the Coast Guard has jurisdiction of the safety

(Testimony of Russell A. Bergemann)

features of ships and the Coast Guard had representatives in the yard to see that the things were built correctly according to their code. The Maritime Commission inspectors themselves, of course, were not members of any branch of the Service. They were just—they were employees of the Maritime Commission.

Of course when we built our troop transports they were delivered to the Navy by the Maritime Commission immediately upon the completion of them and as a result we had quite a staff of Naval inspectors in the yard when we were building the troop transports who inspected them.

The Court: During the progress of the work and during [109] the relevant time in this case, weren't there inspectors of the Maritime Commission and of other Governmental agencies that looked to see whether or not the question of cost was being properly regulated by the contractor?

The Witness: Yes.

The Court: In other words you could not pad your rolls with a thousand men when eight hundred men could do the job?

The Witness: That is right.

The Court: And the Maritime Commission was there to watch the labor conditions, were they not?

The Witness: That is right.

The Court: And did watch it, didn't they?

The Witness: Yes. They would complain to us if they were walking around the yard and saw something irregular. If they happened to see somebody asleep or somebody shooting craps or something they would be banging on our door wanting to know when we were going to clean the matter up.

(Testimony of Russell A. Bergemann)

The Court: Suppose too much time was taken by the employees to eat their lunch?

The Witness: Well, I was going to bring out the fact that at one time they suspended an arbitrary amount of about, in round figures, \$100,000 or so because the auditors were of the opinion that men were quitting early to eat lunch and also men were quitting early to line up at the clocks and they suspended this money. We subsequently had it restored because it was just an arbitrary suspension. That was quite [110] a problem in all the shipyards as you probably know. They were big things and it was hard to keep the men at work for the full eight hours. They would line up at the clocks to get out of work on time or they would quit to eat lunch early.

The Court: That is all the questions the court has.

Recross Examination

By Mr. Bertram:

Q. Mr. Bergemann, you mentioned the union contract. To your knowledge were all employees paid in accordance with that union contract? A. Yes, sir.

Q. That is all the employees subject to it, of course?

A. Yes. Do you mean—I don't quite get your question. We paid the rates specified in the contract. If we paid too much we wouldn't get reimbursed.

Q. I was going to ask you the next question—no employee got paid more than was specified in the contract? A. Yes.

Q. Under what circumstances?

A. Well, for instance the operating—we lost \$40,000 on the operating engineers because there was a provision in there that if the crane had a capacity of 20 tons or

(Testimony of Russell A. Bergemann)

less you paid a certain rate, and if it was in excess of 20 tons you paid a higher rate, and without our knowledge, [111] without the knowledge of the proper parties, why, the superintendent of crane operators started paying a higher rate to everybody regardless of what type of crane it was, because he had more flexibility that way and so the Maritime Commission auditors got, or, rather, the operating engineers' business agent went over to Consolidated Steel and wanted the same deal and so finally it got back to our auditors and they went out and checked it and the first thing we knew we had a \$40,000 suspension that we never got back.

Q. To your knowledge did Mr. Mills receive anything in excess of what was provided for in the contract?

A. I don't know.

Q. Do you know of any other instances other than the crane operators in which that happened?

A. Well, I used to have trouble with the Maritime Commission on interpretations. For instance, I started paying truck drivers according to the actual capacity of the truck. In other words, we had rates for so many tons and the Maritime Commission auditor decided that we had to be guided by the manufacturers' specifications. Well, when we got a truck in, of course, we would alter it so we could carry more on it and they suspended \$350,000 on that but I got it straightened out by getting Washington to see the thing my way.

Q. You got it back, in other words? [112]

A. Yes.

Q. Mr. Bergemann, when a dispute came up or a grievance was to be presented by the business manager or business representative of the union, were there em-

(Testimony of Russell A. Bergemann)

ployees beneath you through whom those grievances might be brought before they came to your attention?

A. Yes. I had—We had about four fellows working for me that took care of it from day to day, the grievances.

Q. Would they frequently take care of the grievances without bringing them to your attention?

A. Well, they gave me reports on everything so I knew what was going on.

Q. Were grievances taken up if they involved a journeyman, first with the man's superintendent?

A. Well, there wasn't any grievance procedure in the contract—the contract did not call for that, but naturally there were a lot of smaller grievances that took place out in the yard that never got—that were settled by a foreman or the superintendent and never got any further.

Q. You have a copy of the standard agreement which covered the working conditions in the Cal shipyard?

A. I haven't one with me, no.

Q. You haven't? A. No.

Mr. Bertram: Do you have one with you, Mr. Sanders? [113]

Mr. Sanders: No.

Mr. Bertram: I have one in my possession. I would like to offer it. I don't have it here at hand but before the case is closed I would like to offer that in evidence.

I have no further questions of Mr. Bergemann.

Mr. Sanders: No further questions.

The Court: That is all, Mr. Bergemann.

Mr. Sanders: Colonel Irwin, will you take the stand?

CLAIR IRWIN,

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name. .

The Witness: Clair Irwin.

Direct Examination

By Mr. Sanders:

Q. Your name is Colonel Clair Irwin?

A. Yes, sir.

Mr. Sanders: May I ask this time card be marked?

(The document referred to was marked as Defendant's Exhibit B, for identification.)

Q. By Mr. Sanders: Mr. Irwin, I show you Plaintiff's Exhibit 1 in evidence, and ask you to direct your attention to these sheets only following the one numbered 17194. Will you tell me, please, what those sheets are? [114]

A. This is a change of status notice showing where Mr. Mills had been transferred under date of, approximately October 20, 1943, from swing shift to day shift, as an operating engineer.

Q. What were these change of status notices made up for? For what purpose?

A. Well, it starts out as a hiring slip, the change of status. That is set up in, I believe, about eight or ten copies of which the various divisions throughout the organization would get a copy. Like your timekeeping department would have to have a copy. The Maritime Commission also had to have a copy of any change that was made. And naturally the payroll division had to have a copy, and personnel had a copy.

(Testimony of Clair Irwin)

Q. Did the industrial relations department of the Maritime Commission receive a copy of every one of these personnel status changes?

A. I wouldn't say the industrial relations division of the Maritime Commission. I think that went to the accounting division of the Maritime Commission. In other words, they had complete control on our manpower even to terminations. Do you want me to go on with each one of these?

Q. No, that is all. I hand you Defendant's Exhibit B, marked for identification, and ask you to describe what [115] that is, please?

A. Well, this is what we call an I.B.M. or daily time card. "I.B.M." is the International Business Machines. This shows the time that the man clocked in and also shows the time that he clocked out.

Q. Those are the times in the lower right-hand corner of the card?

A. That is correct.

Q. Are these the type of card that were used at the shipyard for union employees?

A. Yes.

Q. Exclusively those who were on an hourly rate?

A. Yes, sir.

Q. Now, directing your attention to the columns in the left center showing actual hours worked, allowed hours, total hours paid. Do you see that?

A. Yes, sir.

Q. What are those columns?

A. Well, those columns are filled in by the timekeeper. This is a daily time card and each day a new time card is put out for the individual worker. This first column is supposedly the actual hours worked. However, the timekeeper can only go by the time punched and that

(Testimony of Clair Irwin)

shows on graveyard shift seven hours. The next column is the allowed hours and on graveyard shift we allowed them one [116] hour, making a total in the third column of eight hours.

Q. Now, does this card show the rate of pay?

A. Yes, it does.

Q. Whereabouts is that?

A. That is on the very top line.

Q. Above where it says "rate"?

A. That is correct; about the center part of the card.

Q. What is the rate on that card?

A. On this particular card it shows \$1.53.

Q. And whose time card is that?

A. This is T. C. Mills, Badge No. 55238.

Mr. Sanders: I wish to offer Defendant's Exhibit B into evidence at this time, your Honor, with the stipulation from counsel that the other time card for the period, April 24, 1944 to November 13, 1944, will be identical as far as the entries as to rate, actual hours worked, and allowed hours, and hours credited.

Mr. Bertram: Yes, they are identical in form as far as we know and I will so stipulate.

Mr. Sanders: I offer it in evidence at this time, your Honor.

The Court: May I see it for a moment, please? It will be received and marked filed.

(The document heretofore marked as Defendant's Exhibit B, was received in evidence.) [117]

Mr. Sanders: No further questions, your Honor.

(Testimony of Clair Irwin)

Cross Examination

By Mr. Bertram:

Q. Mr. Irwin, how long were you employed at the Cal Shipbuilding Corporation in the capacity in which you described?

A. Well, I came to work in August of 1941 in the accounting division, timekeeping.

Q. Now, from October 1943 until August of 1945 was there any significant change in the manner in which employees were paid and computation of their rates?

A. Well, yes. In the early days they did not show the premium time on the I.B.M. cards.

Q. What do you mean by "premium time"?

A. Well, the day shift paid straight time, swing shift was paid ten per cent more, and the graveyard shift was paid 15 per cent more premium time. I think it was sometime in the early part of 1945 that we ballooned the rates as we called it.

Q. What do you mean by "balloon the rates"? Will you describe that?

A. Well, they took the base rate, hourly rate, and divided it by seven hours for graveyard and divided it by seven and a half hours for swing, which gave them a ballooned rate. [118]

Q. Actually those—unless there had been an up-grading of any particular employee, that employee's compensation would be the same for the same hours of work on the same shift, would it not, both before and after this change?

A. Oh, yes, his compensation would be the same. Of course there was several rate increases.

(Testimony of Clair Irwin)

Q. But ignoring rate increases the employee's rate of compensation for the hours worked which he performed, was the same before you ballooned the rate as it was after you ballooned the rate?

A. That is right. It was done for purely a book-keeping purpose—from a bookkeeping standpoint—accounting feature.

Q. Now, in addition to the ten per cent and 15 per cent premiums of which you spoke, there was also a premium in hours worked, was there not?

A. That is right.

Q. Or in hours allowed, as you called it, on your time card?

A. That is right.

Q. What was it for the graveyard shift?

A. One hour for the graveyard shift. In other words, they worked seven and got paid for eight. Supposed to work seven.

Q. That was true for all employees in the yard under [119] the I.B.M. time card system?

A. (No answer.)

Q. If you don't know say so.

A. I believe so.

Q. Was it true of Mr. Mills as far as you know?

A. Oh, yes, yes. I was trying to think of some particular classification that might not have been in that category.

Q. Was any special title or name applied to the rate upon which you added the percentage premium and the time premium?

A. I don't understand your question.

Q. Was that called a base rate, something of that sort?

(Testimony of Clair Irwin)

A. Well, the base rate was your day shift rates.

Q. And is it true that all employees on a comparable grade in the same classification on whichever shift they worked, had the same so-called base rate?

A. Surely.

Q. And then onto that base rate the swing shift employees had added this ten per cent premium and one-half hour premium, is that correct?

A. That is right.

Q. And the graveyard employees had added to that base rate the 15 per cent premium plus a one-hour premium, [120] is that right?

A. That is correct.

Q. I am going to show you on Plaintiff's Exhibit 1, change of status notice dated 12-23-43, with typing in red letters, "Shift Transfer", and ask you if you can tell from that notice what change was made in Mr. Mills' status?

A. He was transferred from the day shift as a senior engineer to the graveyard shift as a senior engineer.

Q. And what happened, if anything, to his rate of pay?

A. He got 15 per cent.

Q. I note that opposite the word "rate" and under the column "Figure 2", which I assume means the status to which he was changed, the rate is given as \$1.33, the same as it is on the shift from which he was changed?

A. That is correct.

Q. Now, what is that \$1.33 figure?

A. That figure is the base rate or was the base rate at that particular time. No matter what shift you were on as a senior engineer your rate would be \$1.33. The accounting division had to figure the ten per cent which is so indicated on the time card.

(Testimony of Clair Irwin)

Q. Next directing your attention to change of status notice dated 3-24-45 on Plaintiff's Exhibit 1, opposite the word "rate" we find the figures one dollar seventy-four and eight-tenths. Will you explain what that rate is? [121]

A. Well, on or about this date was when they changed over to what we called the balloon rate and that is the blown-up rate of \$1.33. You take that and divide it down and you come back to your day shift of \$1.33. The rate was never changed even to the date of termination. His rate probably stayed the same. I don't know whether he left—no, no.

Q. In other words, as I understand your testimony, Mr. Irwin, Mr. Mills' rate continued from the time he was changed to the graveyard shift at \$1.33 base plus 15 per cent money premium, plus one-hour time premium, or a total of \$1.74-8/10th per hour?

A. That is correct.

Q. Now, Mr. Irwin, Defendant's Exhibit B, being a sample time card, contains, as you described, an entry under "Actual Hours Worked": 7. Under "Allowed Hours": 1. Under "Total Hours Paid": 8.

A. That is right.

Q. Now, what does the 7 under "Actual Hours worked" indicate?

A. That indicates this time here.

Q. Pointing to the clock entries?

A. The clock entry showing the man came in at a certain time and left at a certain time. I would not say that this actually means the time that he worked. He might have [122] clocked in here at two minutes past twelve and maybe wandered around the yard for 20 minutes or 25 minutes.

(Testimony of Clair Irwin)

Q. As a matter of fact, this card does show that he entered—that is, he punched the time clock at two minutes past twelve midnight, does it not?

A. That is correct.

Q. And punched out at 17 minutes after eight in the morning?

A. That is correct.

The Court: That is Exhibit A?

Mr. Bertram: That is Defendant's Exhibit B.

Q. By Mr. Bertram: Now, let me ask you this question. Unless you and the payroll or timekeeping department received some specific information that that additional time, in this case a half hour before and 17 minutes after, was actually time worked, you would disregard that in making the entries of the time worked, would you not?

A. Yes. If he was authorized to any overtime it would be stamped right across the card showing authorized time.

Q. Well, the question I am asking is this: This particular time card indicates that there was a half hour before the shift started and 17 minutes after the shift ended?

A. Yes, when he clocked out. [123]

Q. When he clocked in and out respectively?

A. That is right.

Q. Now, unless you received some specific information other than simply the time card showing those punches, that he had actually performed duties during that time you would ignore that extra time outside of the scheduled shift, would you not?

A. Yes, sir.

Q. And if there being an elapsed time in the scheduled shift of seven and a half hours you would enter seven as the number of hours actually worked?

A. That is right.

(Testimony of Clair Irwin)

Q. By the way, the pencil entries showing the hours actually worked, the hours allowed and the hours paid for is put in there by the timekeeping department?

A. That is put in there by the timekeeper handling this man's card.

Q. And not by the employee himself?

A. No, no. He takes the card and clocks it in and drops it in a box and the timekeeper picks it up and at night the card goes out again with that information on there so he can clock out and then they check the card in the office.

Q. So that this particular card shows that that employee for that day was allowed the compensation which you described for seven hours' work? [124]

A. That is right.

Mr. Bertram: I think we stipulated that seven hours was allowed, seven hours actually worked and one hour allowed and eight hours paid a person on all of the time cards through this period of time.

Mr. Sanders: For the period in our stipulation.

Mr. Bertram: Yes.

Mr. Sanders: You read it into the record.

Mr. Bertram: I have no further questions.

Mr. Sanders: I have no further questions, your Honor.

The Court: Very well.

Mr. Sanders: The defendant rests.

The Court: I would like to ask the first witness a question.

Mr. Bertram: Mr. Gillen, will you come forward, please?

FRANK GILLEN,

called as a witness by and on behalf of the plaintiff, having been previously duly sworn, was recalled and testified further as follows:

The Court: Mr. Gillen, were you working in the same department as Mr. Mills? A. Yes, sir.

The Court: The date does not seem to be shown here unless I have overlooked it. Here it is. It is dated on [125] the back: July 30th, 1944.

Mr. Sanders: Your Honor, the actual date, that is the work-week date, the date of the card is in the extreme upper right-hand corner. The first numeral is the month and the second numeral is the date.

The Court: On July 24th, that would be, and I presume that is the year, 1944. Were you working there in that same area and in the same job at that time?

The Witness: Now, that is a long time for me to remember back, but I did work with him all the time after he commenced working for Cal Ship.

The Court: Let me put it this way then. Did you clock in during all of the time that you worked there?

The Witness: Yes, sir.

The Court: In and out?

The Witness: Yes, sir, all of us, yes, sir.

The Court: Where was the clock located?

The Witness: Well, when we first went there our clock was located in Area 29, at the end of the building. That is down in the middle of the yard, on the north side of the loft building, next to No. 2 compressor plant. That is where our clock was at that time.

The Court: How far would that be from the boiler room where Mr. Mills and you worked?

(Testimony of Frank Gillen)

The Witness: That is, oh, the full length of the [126] docks and then over this way. I would say more than a half a mile or about that, pretty near that. Now, I can't exactly tell you.

The Court: Approximately a half mile?

The Witness: Yes, approximately a half mile.

The Court: Approximately a half mile from the place of work to the clock during that period?

The Witness: That was in the beginning. Later we had to go to the clock at the gate which was farther. Those other clocks were removed and we had to use the clock next to the gate where we come in, which was a longer walk.

The Court: How much further would that be?

The Witness: Well, it is just kind of hard to tell. Walking in that yard takes you five minutes or so to walk it—all of that. I would say a trifle, maybe, over a half mile.

The Court: I believe the average walking speed of an average man is about three miles an hour—unimpeded walking?

The Witness: Well, I think you would have to walk pretty fast to get from the lower end of the outfitting dock up to the front gate in five or seven minutes.

The Court: That is all I wanted. Thank you.

Anything further, gentlemen?

Mr. Bertram: We would like permission to have the opportunity to introduce the union agreement. [127]

The Court: I think you can introduce that when you get it. You can stipulate to the fact it is the union agreement.

Mr. Sanders: I may have some objection to it. I don't know what relevancy it has or what the purpose of offering it is.

Mr. Bertram: As I recall, the last time I examined it it does set forth what the scheduled hours of work and the shift premium allowed and so forth.

Mr. Sanders: You have that by Mr. Irwin's testimony, counsel. It would just bear that out, wouldn't it?

Mr. Bertram: I think it would. It would also indicate whether any provision was made for payment of this extra lunch hour which we claim was worked and not paid for.

The Court: I do not think we would be justified in holding another session of this court simply to introduce that document. That would simply add to the cost of this case which is one of the features the court tries to avoid as far as it can. The public interest is a factor in these cases, as shown by the evidence. Any award made here comes from the public treasury and it is the duty of the courts to see that the public interest is safeguarded in these actions.

Just what does the contract contain that you desire to offer in this case, Mr. Bertram? [128]

Mr. Bertram: Well, some reference was made to the provision of the union contract and also reference was made on cross examination of the plaintiff's witnesses by counsel, to the effect that perhaps there is some practice or agreement concerning the working of an extra half hour or extra lunch time without being paid for it. Now, if the agreement so provides it will show the agreement and it will be the best evidence of that.

I am satisfied from any recollection of it that there is no such provision but on the contrary it provides for

payment in the manner Mr. Irwin described for these various shifts consisting of so many hours each.

The Court: What do you contend, Mr. Sanders?

Mr. Sanders: Well, our contentions in the matter are similar, your Honor. We are not trying to contend that the union waived a half hour lunch period. I do not think that would be binding on the employee in this action in any way even if it did.

The Court: Well, do you want to offer it in view of this concession or statement?

Mr. Bertram: No, I think that is all right if it will be conceded that the union contract made provision for employees working on the graveyard shift, working seven hours and receiving these shift differentials which Mr. Irwin described. [129]

Mr. Sanders: That is right.

The Court: Of course they are naturally going to argue that their witness told the truth about it. If you are not going to dispute it why do you want to supplant it with a writing here? It just accumulates the record.

Mr. Bertram: As long as Mr. Sanders concedes that I see no point in offering that exhibit.

The Court: Is there anything further?

Mr. Bertram: I think that disposes of that matter. I don't know if the record is quite clear on the period following the so-called ballooning of rates as to the number of hours which were paid for and allowed. I would like to ask Mr. Irwin two more questions on that.

The Court: Very well.

Mr. Sanders: You are calling him now as your own witness?

Mr. Bertram: No, continuing my cross examination, if I may.

The Court: It is so ordered.

CLAIR IRWIN,

called as a witness by and on behalf of the defendant, having been previously duly sworn, was recalled and testified further as follows:

Cross Examination (Resumed)

By Mr. Bertram:

Q. Mr. Irwin, in the course of familiarizing yourself [130] with Mr. Mills' time record, did you examine his time cards?

A. No. I glanced at them when you and I were over there before his Honor came in, but I didn't study them.

Mr. Sanders: I don't think that question is quite fair, your Honor. I don't think Mr. Irwin testified he familiarized himself with the time cards.

Mr. Bertram: I did not mean to be unfair. I just wanted to lay a foundation to see if Mr. Irwin knows the answer to a question. I don't think he does; so I would like then to offer the time card from the period following the ballooning of the rate. The purpose of that, your Honor, is this: To show that during that period, just as in the preceding period, Mr. Mills was paid eight hours of pay for seven hours of work on the graveyard shift.

The Court: To which period are you now referring?

Mr. Sanders: That appears in our stipulation on page 2, your Honor, the last period.

The Court: November 14th, 1944 to August 28th, 1945?

Mr. Bertram: That is right.

The Court: It is so understood.

Mr. Bertram: Perhaps counsel will stipulate to that

(Testimony of Clair Irwin)

Mr. Sanders: I will ask if counsel is willing to put in one card?

Mr. Bertram: Yes. And we will stipulate then that the information on those time cards, except as to the precise [131] clock punching, is identical. May we have this marked as Plaintiff's Exhibit 2?

The Court: That is merely an exemplar of the others with the exception that the clock times indicated are different?

Mr. Bertram: That is correct.

The Court: It is so ordered. It will be received and filed.

(The document referred to was marked as Plaintiff's Exhibit 2, and was received in evidence.)

The Court: The exhibit is an exemplar. It does not purport to represent the entire situation for the entire period. It is simply an exemplar tending to show what it does show as to the rate which was the same and all of the other factors on the card other than those that are indicated by the clocking indication.

Mr. Bertram: In this case, your Honor, we have stipulated for this later period on the employees' rate, which was one dollar seventy-four and eight-tenths cents. Now, I am offering this exhibit as an example of all other time cards during this period for the purpose of showing that now seven hours were paid for, seven hours credited to the work.

The Court: All right.

Mr. Bertram: And that is true on all time cards for [132] this period.

Mr. Sanders: No objection, your Honor.

The Court: It is received.

(Testimony of Clair Irwin)

Mr. Bertram: I have no further questions of Mr. Irwin.

Mr. Sanders: May I have a question on redirect in connection with Plaintiff's Exhibit 2?

The Court: Yes.

Redirect Examination

By Mr. Sanders:

Q. Showing you again Defendant's Exhibit B, a time card for the work week of June 1944, what is the rate of pay thereon? A. \$1.53.

Q. Now, showing you Plaintiff's Exhibit 2 in evidence, what is the rate of pay thereon?

A. \$1.74-8/10ths.

Mr. Sanders: That is all.

Mr. Bertram: We have nothing further. The plaintiff rests, your Honor.

The Court: I think perhaps we should hold a decision here in abeyance until such time as we learn what Congress is going to do with respect to the so-called Portal to Portal cases.

I do not know that that decision will have any materiality or relevancy to this case, but it may. We [133] cannot tell until we see it.

I think you gentlemen should brief the case in view of that fact rather than have another session in the courtroom.

Mr. Sanders: As I understand it, the Bill has already gone to the President.

The Court: When did the Bill go to the President, Mr. Sanders?

Mr. Sanders: It was in the newspaper last Thursday or Friday. I believe it takes a couple of days for it to

(Testimony of Clair Irwin)

be embossed and officially sealed before it goes up from Capitol Hill to the White House. It will probably be another week.

The Court: If we have the opening brief in ten days and the reply brief in another ten days, and then the closing brief in about five, that should cover all possible situations. That will be the order. And upon the filing of the last brief the cause will stand submitted for decision.

Mr. Bertram: Before you leave the bench, your Honor, may I be clear on the contents of the brief? Was it indicated by your statement you want us to touch upon the possible effect of pending legislation?

The Court: Well, yes, that is one of the principal reasons. We want to know what this Bill contains; whether [134] it has anything that throws any light on the problem in this case.

Mr. Bertram: And the remaining points in issue, such as commerce?

The Court: Yes. This question of commerce is a very narrow question. Factual matters and the question as to proper accounting should be discussed in your briefs. Mr. Bertram.

Mr. Bertram: Very well.

Mr. Sanders: Yes, your Honor.

The Court: Upon receipt of the briefs the case will stand submitted.

(Whereupon, at 3:30 o'clock p. m., the above entitled proceedings were concluded.)

[Endorsed]: Filed Oct. 27, 1947. Edmund L. Smith, Clerk. [135]

[DEFENDANT'S EXHIBIT A]

Contract No. MCc-2128

This Contract entered into as of this 17th day of January, 1942, between the United States Maritime Commission (herein called the "Commission") and California Shipbuilding Corporation, a corporation organized and existing under the laws of the State of Delaware (herein called the "Contractor").

Whereas:

1. Under the provisions of Public Law 247 (77th Congress) approved August 25, 1941, the Commission is authorized to construct in the United States, merchant vessels of such type, size and speed as it may determine to be useful for carrying on the commerce of the United States and suitable for the conversion into naval or military auxiliaries and to produce and procure parts, equipment, material and supplies for such vessels, without advertising or competitive bidding;

2. The Commission has determined that the vessels hereinafter described are of a type, size and speed which will be useful for carrying on the commerce of the United States and suitable for conversion into naval or military auxiliaries, and desires the Contractor to construct said vessels; and

3. Under dates of January 11, 1941 and April 9, 1941, the Contractor and the Commission entered into two contracts (said two contracts being herein called the "Facilities Contract") whereunder the Contractor agreed to construct for the Commission on land leased or owned by the Contractor such shipyard facilities as are provided for in said Facilities Contract; and

(Defendant's Exhibit A)

4. The Contractor is willing to construct the vessels hereinafter described at the site of said shipyard facilities in consideration of a reimbursement to it of the costs of such construction work and the payment by the Commission of a fee upon the terms and conditions hereinafter specified.

Now, Therefore, in consideration of the premises and mutual covenants, agreements, and conditions hereinafter set forth, the parties hereto agree as follows:

ARTICLE 1.

The term "Vessel" shall be deemed to include the hulls of the vessels, whether completed or uncompleted, to be constructed by the Contractor pursuant to the terms of this contract, and also all materials, vessel items and appurtenances, vessel machinery and vessel equipment used or to be used in the construction or equipment thereof.

The term "Facilities" shall be deemed to include the shipyard and facilities and all machinery, materials, items, equipment and appurtenances used or to be used in the construction or equipment thereof, but not the land on which said shipyard and facilities shall be constructed.

ARTICLE 2.

(a) The Contractor, acting as an independent Contractor, and not as agent, shall construct, launch, equip and complete ready for service, and deliver to the Commission 109 steel hulled, steam-propulsive powered, cargo-carrying vessels (herein called the "Vessels") equipped and constructed with their machinery, materials, items, equipment and appurtenances. The Contractor shall perform its obligations as set forth above at Los Angeles,

(Defendant's Exhibit A)

California, on the site of the Facilities described in the Facilities Contract, in accordance with the terms of this contract and the plans and specifications (herein called the "Plans and Specifications") which have, at or before the execution of this contract, been approved by the Commission and identified by the signatures of the parties hereto, and which are hereby made a part hereof with the same force and effect as though herein set out in full. The Contractor shall furnish all labor, materials, supplies and equipment (except materials, supplies and equipment to be furnished by the Commission) required to perform its obligations as set forth above.

(b) All general language or requirements contained in the Plans and Specifications are intended to amplify, explain and implement the requirements of this contract, but any such general language or requirements inconsistent with the provisions hereof are superseded by this contract. The Plans and Specifications are also intended to explain each other and anything shown upon the Plans and not stipulated in the Specifications, or stipulated in the Specifications and not shown upon the Plans, shall be deemed and considered as if included in both.

(c) Until the last of the Vessels shall have been completed, unless this Contract shall be terminated at an earlier date, as hereinafter provided, the Contractor, without payment of rent therefor, shall have use and possession of the Facilities owned by the Commission for the sole purpose of constructing the Vessels upon the terms and conditions hereinafter set forth, but the Commission or any of its agents or contractors shall at all times subsequent to the date of this contract have the right to

(Defendant's Exhibit A)

use the Facilities or parts thereof to the extent that such use will in the opinion of the Commission not interfere with the performance of the work hereunder.

(d) The Contractor at the expense of the Commission shall maintain and keep the Facilities and premises on which such Facilities are constructed, and all appurtenances and equipment thereof, in good order and condition for the work to be performed hereunder.

(e) The Contractor shall police the Facilities and shall use reasonable diligence to exclude all unauthorized persons therefrom and to prevent loss or injury to the Facilities or the Vessels.

(f) The Contractor shall promptly pay any rental due under any lease made by the Contractor for the premises on which the Facilities are located, or any part thereof, and shall duly and faithfully perform each and every of its obligations, undertakings, and covenants under such lease or leases. In the event that the premises on which the Facilities are located, or any part thereof, shall be owned by the Contractor, the Contractor shall pay promptly all taxes, assessments and other charges levied or assessed thereon and shall not create or permit to be created any right, including mortgages, liens, or other incumbrances, by which any person shall have any claim or interest in or to any improvement, building, structure, or equipment erected or constructed on said premises pursuant to the Facilities Contract, even though the same shall have been attached thereto and become part thereof.

(Defendant's Exhibit A)

(g) Without the prior written consent of the Commission, the Contractor shall not use the Facilities or any of the buildings, appurtenances, or equipment located on the premises described in the Facilities Contract for any purpose other than that of constructing the Vessels, and the authorized representatives of the Commission shall have access to the Facilities at all times for the purpose of determining whether the Contractor is complying with the requirements of this contract and the Facilities Contract.

ARTICLE 3.

The Commission reserves (without limitation thereof) the right to correct any errors or omissions in, and to make any changes in, deductions from, or additions to, the Plans and Specifications. However, changes shall not be made in the general dimensions and characteristics of any of the Vessels unless such changes are made with the written consent of the Contractor.

The Contractor shall not depart from the requirements of the Plans and Specifications unless such departure is approved in writing by the Commission. No changes of any nature affecting the construction, equipping and completion of any of the Vessels are to be started or made by the Contractor before such changes have been duly authorized in writing by the Commission.

ARTICLE 4.

Certain of the materials, equipment, and machinery to be used in the construction of the Vessels will be fur-

(Defendant's Exhibit A)

nished to the Contractor by the Commission. A list of such materials, equipment, and machinery is attached hereto and marked "Exhibit A," and the Contractor shall not, without the prior written consent of the Commission, purchase or agree to purchase for use in connection with the performance of the work hereunder any of the items listed on said "Exhibit A." The Contractor, at the expense of the Commission, shall adequately store and care for all such materials, equipment and machinery delivered to the site of the Facilities until they shall be incorporated in the Vessels and shall pay all transportation charges thereon which are payable upon delivery.

At any time during the course of the performance of the work hereunder, the Commission may amend said "Exhibit A" so as to add to the list of items therein contained. Within ten days from the date of receipt of a notice of such amendment, the Contractor shall notify the Commission of any items included in such amendment which the Contractor has purchased or agreed to purchase with the approval of the Commission prior to the receipt of notice of the amendment, and such amendment shall be ineffectual as to any such items. The Contractor shall thereafter follow the instructions of the Commission with respect to such items as may be effectively added to said Exhibit by such amendment, but the Contractor shall be reimbursed for any costs incurred by it in following such instructions.

(Defendant's Exhibit A)

Set forth opposite each item of material, equipment and machinery on "Exhibit A" is a list of dates furnished by the Contractor, on or before which the quantities of material and equipment and the items of machinery indicated shall be delivered by the Commission to the site of the Facilities to enable the Contractor to deliver the Vessels in accordance with the schedule of Vessel deliveries contained in Article 5 hereof. On any amendments to Exhibit A the Contractor shall furnish to the Commission the dates on which the additional material covered thereby shall be required in order to enable it to meet said schedule of Vessel deliveries.

ARTICLE 5.

The Contractor shall deliver each of the Vessels to the Commission after such Vessel has been completed ready for service, and has passed the tests as prescribed in the Specifications. Such delivery shall be made at or near the shipyard referred to in Article 2 (a) hereof, at a place alongside of a safe and accessible pier at that place, where there must be sufficient water for the Vessel always to be afloat, custom to the contrary notwithstanding, free and clear of all liens and claims of every nature, or at such other place as may be mutually agreed upon.

Unless prevented by any of the causes enumerated in Article 6 hereof, the work under this contract shall be commenced on or before February 1, 1942 and shall be prosecuted with diligence and the time thereafter within

(Defendant's Exhibit A)

which each of the Vessels is to be delivered to the Commission, unless such time is extended by conditions of "force majeure" as defined in Article 6 hereof, or under any of the other provisions hereof, is to be in accordance with the following schedule:

Commission's Hull Numbers	Contractor's Hull Numbers	Delivery Dates
631	56	October 12, 1942
632	57	October 21, 1942
633	58	November 2, 1942
634	59	November 7, 1942
635	60	November 6, 1942
636	61	November 9, 1942
637	62	November 12, 1942
638	63	November 16, 1942
639	64	November 21, 1942
640	65	November 23, 1942
641	66	November 27, 1942
642	67	December 1, 1942
643	68	December 9, 1942
644	69	December 11, 1942
645	70	December 15, 1942
646	71	December 18, 1942
647	72	December 22, 1942
648	73	December 28, 1942
649	74	December 30, 1942
650	75	December 31, 1942
651	76	January 9, 1943
652	77	January 15, 1943
653	78	January 16, 1943
654	79	January 18, 1943

(Defendant's Exhibit A)

Commission's Hull Numbers	Contractor's Hull Numbers	Delivery Dates
655	80	January 20, 1943
656	81	February 1, 1943
657	82	February 8, 1943
658	83	February 15, 1943
659	84	February 17, 1943
660	85	February 20, 1943
661	86	February 22, 1943
662	87	February 27, 1943
663	88	February 27, 1943
664	89	March 1, 1943
665	90	March 6, 1943
666	91	March 11, 1943
667	92	March 13, 1943
668	93	March 15, 1943
669	94	March 19, 1943
670	95	March 26, 1943
671	96	April 5, 1943
672	97	April 10, 1943
673	98	April 12, 1943
674	99	April 15, 1943
675	100	April 17, 1943
676	101	April 24, 1943
677	102	April 24, 1943
678	103	April 29, 1943
679	104	May 3, 1943
680	105	May 6, 1943
681	106	May 8, 1943
682	107	May 10, 1943
683	108	May 15, 1943
684	109	May 24, 1943

(Defendant's Exhibit A)

Commission's Hull Numbers	Contractor's Hull Numbers	Delivery Dates
685	110	May 31, 1943
686	111	June 5, 1943
687	112	June 7, 1943
688	113	June 12, 1943
689	114	June 14, 1943
690	115	June 18, 1943
691	116	June 19, 1943
692	117	June 23, 1943
693	118	June 26, 1943
694	119	July 3, 1943
695	120	July 6, 1943
696	121	July 7, 1943
697	122	July 12, 1943
698	123	July 20, 1943
699	124	July 27, 1943
700	125	August 2, 1943
701	126	August 3, 1943
702	127	August 7, 1943
703	128	August 9, 1943
704	129	August 14, 1943
705	130	August 16, 1943
706	131	August 18, 1943
707	132	August 23, 1943
708	133	August 30, 1943
709	134	September 1, 1943
710	135	September 2, 1943
711	136	September 7, 1943
712	137	September 15, 1943
713	138	September 21, 1943
714	139	September 27, 1943

(Defendant's Exhibit A)

Commission's Hull Numbers	Contractor's Hull Numbers	Delivery Dates
715	140	September 28, 1943
716	141	October 5, 1943
717	142	October 6, 1943
718	143	October 9, 1943
719	144	October 11, 1943
720	145	October 13, 1943
721	146	October 18, 1943
722	147	October 25, 1943
723	148	October 27, 1943
724	149	October 28, 1943
725	150	November 2, 1943
726	151	November 10, 1943
727	152	November 18, 1943
728	153	November 22, 1943
729	154	November 24, 1943
730	155	November 29, 1943
731	156	December 1, 1943
732	157	December 6, 1943
733	158	December 7, 1943
734	159	December 10, 1943
735	160	December 15, 1943
736	161	December 20, 1943
737	162	December 23, 1943
738	163	December 24, 1943
739	164	December 27, 1943

Provided that the Commission in its sole discretion may for any reason extend the time for delivery of the first three Vessels to be constructed hereunder and also in its sole discretion may extend the time for the delivery of

(Defendant's Exhibit A)

the balance of the Vessels or any thereof to the extent that in its judgment said Vessels will be delayed by reason of the delay in the delivery of the said first three (3) Vessels.

It is mutually agreed by and between the parties hereto that time is of the essence of this contract, and that all actions taken by the parties hereto and their agents shall be taken to the end that the performance of this contract will be fully expedited.

The Contractor may in its discretion operate the shipyard and all facilities used in the construction of the Vessels and may carry on the work of constructing the Vessels seven (7) days per week (legal holidays excepted) and such number of shifts per day as may be determined by the Contractor.

Subject to the provisions of Article 19 hereof, the rate of wages paid by the Contractor for work performed under this contract shall not, without the consent of the Commission, be in excess of those established by any stabilization or other conference held under the auspices of the National Defense Advisory Commission or other agency of the United States for the region in which the shipyard is located, or in the event that rates have not been established for such region, in excess of those which may be approved from time to time by the Commission.

ARTICLE 6.

The term "force majeure" as employed herein shall be deemed to mean all causes whatsoever (except inclement weather of the ordinary seasonable nature) not reasonably within the control of the Contractor among which

(Defendant's Exhibit A)

but not exclusive of other causes, are acts of God; war between the United States and any foreign country; civil war, riot or insurrection in the United States; requirement of, intervention by or delays caused by civil, naval or military authorities or other agencies of government; arrests and restraints of rules and people; priorities; blockades; embargoes; vandalism; sabotage; epidemics; strikes, lockouts or other industrial disturbances; earthquakes; landslides; floods, hurricanes and cyclonic storms; damage by lightning; explosions; collisions; strandings; fires; inability of the Contractor to obtain sufficient and adequate labor at wage rates approved by the Commission; shortage of materials and equipment, provided that the Contractor has ordered all necessary materials and equipment at the proper times and used reasonable effort to obtain delivery of such materials and equipment at the time and in the order required to carry on the work properly; delays of carriers by land, sea or air or delays of subcontractors, or delays in the completion of the Facilities for any causes beyond the control of the Contractor including any of those enumerated in this paragraph which delay the starting of or orderly prosecution of the Vessel construction work; or delays due to any failure on the part of the Commission to perform its obligations hereunder, including, but not limited to, failure to act within a reasonable time on subcontracts or plans and specifications prepared by the Contractor and submitted for Commission's approval or failure to furnish the working plans for the Vessels referred to in Article 12 hereof as required by the Contractor, or failure to cause the material listed in "Exhibit A" and any amendments thereof to be delivered at the site of the Facilities

(Defendant's Exhibit A)

on the dates shown in said "Exhibit A" or amendments thereof; or delays due to changes ordered by the Commission in any plans or specifications including any delay resulting from changes in the Facilities referred to in the Facilities Contract made necessary by such changes.

Written notice of any delay caused by "force majeure" and the anticipated result thereof shall, when knowledge thereof has come to the Contractor, be given promptly by the Contractor to the Commission. Within twenty (20) days after such cause of delay has ceased to exist, the Contractor shall file with the Commission a statement of the actual delay resulting from such cause. Provided such notices shall have been given the time for delivery of the Vessel or Vessels, or any following Vessel or Vessels affected by such "force majeure", shall be extended for such time as the Contractor shall have been actually delayed in the completion of such Vessel or Vessels by reason of such "force majeure". In the event that the parties are unable to agree that the cause of delay is "force majeure" or as to the extent of the resulting delay, the matter shall be referred to arbitration as hereinafter provided. The duty of submitting and going forward with the evidence before the Arbitrators shall be on the Contractor.

ARTICLE 7.

The Commission will pay or cause to be paid to the Contractor the entire cost to the Contractor of performing this contract plus a fee for which provision is hereafter made; Provided, That in no event shall the amount payable under this contract (including payments to be made by the Commission under the succeeding Articles

(Defendant's Exhibit A)

hereof) exceed \$109,000,000, unless the Commission shall determine that the cost of performing this contract plus the fees to be paid to the Contractor hereunder will be in excess of such amount and agree by notice in writing to the Contractor to pay such increased cost plus all fees as calculated upon the basis herein set forth; and provided further, that the Contractor shall not be deemed to have guaranteed that this contract can be performed and such fees paid for said amount and shall in no event be obligated to continue its performance of this contract beyond a point at which its obligations under any leases of the premises on which the Facilities provided for in the Facilities Contract shall be constructed and under any contracts for services, labor, material and supplies required for the performance of this contract plus fees payable to the Contractor earned or accrued under the provisions of this contract shall equal the unexpended portion of the amount payable by the Commission hereunder.

A. Such cost shall be determined in accordance with the rules and regulations for determining costs issued by the Commission and entitled "Regulations Prescribing the Method of Determining Profit, Adopted May 4, 1939," as amended, in so far as applicable, and (in so far as the same are not applicable) in accordance with sound accounting practice. There shall be included (but without limitation), in determining such cost, the following items:

1. The actual net cost to the Contractor (after deducting all discounts, refunds, allowances, and price adjustments which have accrued to the benefit of the Contractor) of all materials, equipment, and machinery purchased by the Contractor for the construction of the Ves-

(Defendant's Exhibit A)

sels or for the maintenance or operation of the Facilities and the premises on which they are constructed during the course of the construction of the Vessels.

2. The actual cost of all labor properly chargeable to the construction and protection of the Vessels, the processing of materials for the construction thereof, and the maintenance, operation and protection of the Facilities and the premises on which they are constructed, including piece work and incentive bonuses, bonuses to shift workers, overtime pay, pay for lunch periods and for vacations if actually paid by the Contractor.

3. The salaries and wages of officers, managers, superintendents, foremen, engineers, draftsmen, supervisors, storekeepers, clerks and laborers and all other employees on the pay roll of the Contractor who are engaged in the maintenance, construction or protection of the Vessels or in the maintenance, operation and protection of the Facilities and the premises on which they are constructed, or in clerical or administrative work in connection with any of such activities.

4. The actual net cost to the Contractor of engineering services, plans and specifications, bills of material, estimates, etc., purchased by the Contractor and reasonable legal and accounting fees specifically approved by the Commission, and charges for clerical and administrative services rendered by others (including affiliates) provided that the incurring of such charges and the rates therefor shall have been approved by the Commission.

5. The actual cost of delivery of the Vessels and of any trials or tests which the Contractor may be required to perform prior to the acceptance of the Vessels.

(Defendant's Exhibit A)

6. Rental and other payments made by the Contractor during the period of construction of the Vessels, pursuant to the provisions of any lease approved by the Commission under the Facilities Contract.

7. Reasonable rentals or service charges for equipment, including such equipment owned by the Contractor for periods required, the equipment to be in good working order before rental periods begin. The rental or service charge for a particular piece of equipment shall not exceed the replacement value (at the beginning of the rental period) of such equipment. Whenever the aggregate rental paid for any item of equipment equals the replacement value (at the beginning of the rental period) of such item of equipment, such equipment shall become the property of the Commission.

8. The actual net cost of fuel, power, water, stationery, telephone, telegraph, reasonable traveling and transportation expense of employees, freight, express, trucking, unloading and handling costs, permits, licenses, royalties for the use of patents when authorized by the Commission or required by the design of the Vessel, Federal and State Social Security, Unemployment Compensation and other similar taxes and charges, sales and use, excise and other taxes as defined in paragraph 7.48 of said Regulation, premiums for Workmen's Compensation, public liability, fire and other insurance and bonds to the extent herein provided, and the actual net costs of reconstructing or replacing any work or Facilities destroyed or damaged and not covered by insurance.

9. Actual interest paid or accrued for payment (not in excess of rates approved by the Commission) on loans

(Defendant's Exhibit A)

from others, including affiliates, stockholders, or the parent corporation of the Contractor (subject to the provisions of Article 22 hereof), incurred solely for the purpose of performing this contract and for the period of the construction of the Vessels and for such further periods as the Commission shall approve.

10. The actual net cost of supplies, tools and equipment purchased by the Contractor and used in the construction of the Vessels or for the repair, maintenance and operation of tools and equipment during the course of construction of the Vessels and until final acceptance thereof.

11. General, administrative and operating expenses of the Contractor incurred in the performance of this Contract, not otherwise provided for herein, to the extent approved by the Commission.

12. The actual net cost to the Contractor of carrying on a training program reasonable in extent for the training of employees for the shipbuilding project, including (but not limited to) salaries of instructors, rental of training quarters, if required, cost of supplies, materials, equipment and wages to trainees.

13. State, City, and County taxes assessed against the land and improvements upon which the Vessels or any part or parts thereof are being constructed and referable to the period of construction and paid by the Contractor.

14. All proper cancellation costs and charges incurred by the Contractor when cancellations or terminations are directed and approved by the Commission.

15. The Contractor shall be reimbursed for all costs of remedying defective work or replacing materials as

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required of it by the provisions of Article 12 hereof, or elsewhere under this contract, whether the material or work shall have been furnished or supplied by the Commission or the Contractor.

B. Unless otherwise specifically provided herein, in determining cost reimbursable hereunder, there shall be excluded from such cost (i) the exclusions required by the Regulations above referred to including without limitation those set forth in paragraph 7.23 of said Regulations; provided that any expense approved by the Commission prior to the time it is incurred shall not be deemed to be excessive or unreasonable in the absence of fraud or misrepresentation of the Contractor or its employees, or unless such expenses are for materials or equipment which are used for purposes other than performing work under this contract (ii) depreciation on the Facilities; (iii) salaries or wages, in any form, knowingly paid in violation of Section 1 of Public No. 5 (77th Congress) approved February 6, 1941; and (iv) disbursements made without prior authorization of the Commission for extension or enlargement of the Facilities as described in the Facilities Contract.

C. All excess materials, tools and equipment and other items purchased by the Contractor and for which it has been reimbursed, including scrap, shall remain the property of the Commission and shall be retained and delivered to the Commission or sold for the Commission's account in such manner and at such times as the Commission may direct or approve.

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ARTICLE 8.

In addition to reimbursing the Contractor for all its costs as provided in Article 7 hereof, the Commission shall pay the Contractor for its services a base fee in the sum of \$110,000 for each Vessel completed, delivered and accepted in accordance with the provisions of this contract. This base fee shall be increased or decreased as determined in the following subarticles, A and B to wit:

(A) If delivery of any Vessel is delayed beyond the delivery date stipulated therefor in Article 5 hereof, then the base fee payable to the Contractor under the provisions hereof with respect to said Vessel shall be decreased to cover fixed, agreed and liquidated damages (and not as a penalty) for delay in delivery of each such Vessel an amount equal to \$400 for each and every calendar day of such delay; provided that in the event the delivery date for any such Vessel shall be extended under any provision of this contract, the date for reckoning such liquidated damages shall be correspondingly extended. The exaction of such liquidated damages shall not affect any other rights or remedies of the Commission upon default by the Contractor under any other provision of this contract. If any Vessel is completed and ready for tender of delivery to the Commission prior to the delivery date stipulated therefor in Article 5 hereof, or prior to any delivery date that may exist under any extension of time pursuant to any provision hereof, then the base fee payable to the Contractor under the provisions hereof with respect to said Vessel shall be increased by an amount equal to \$400 for each and every calendar day elapsing between the date on which such

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Vessel is actually completed and ready for such tender of delivery and said delivery date.

(B) It is agreed that the estimated average number of man hours of direct and indirect labor required to complete the work to be performed hereunder by the Contractor on each of the Vessels (hereinafter called the "Estimated Average Vessel Hours") is 625,363 (exclusive of joiner works), subject to the following adjustments for each such Vessel:

(1) For authorized changes in the Plans and Specifications affecting any such Vessel, an equitable adjustment in the Estimated Average Vessel Hours for such Vessel shall be made pursuant to agreement between the parties hereto.

(2) Within ten days after the execution hereof the Contractor has filed with the Commission and the Commission has accepted as the basis for the Estimated Average Vessel Hours as hereinafter set forth a statement of the extent to which it is contemplated the performance hereof will be through outside subcontractors. If any change shall be made in the amount of work so to be performed by subcontractors as so stated, an equitable adjustment shall, pursuant to agreement between the parties hereto, be made in the Estimated Average Vessel Hours for each Vessel affected by such change.

(3) For each day by which the delivery time of any Vessel shall be extended under any of the provisions of this contract, the Estimated Average Vessel Hours for such Vessel shall be increased by an equitable adjustment pursuant to agreement between the parties hereto.

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If the actual average number of man hours of direct and indirect labor expended by employees of the Contractor in the completion of any Vessel (hereinafter called the "Actual Average Vessel Hours") shall be less than the Estimated Average Vessel Hours for such Vessel, adjusted as aforesaid, then the fee payable with respect to such Vessel shall be increased by an amount equal to 50¢ multiplied by the difference between the Actual Average Vessel Hours and the Estimated Average Vessel Hours for such Vessel, adjusted as aforesaid; but if the Actual Average Vessel Hours shall be greater than the Estimated Average Vessel Hours for such Vessel, adjusted as aforesaid, then the fee payable with respect to such Vessel shall be decreased by an amount equal to 33-1/3¢ multiplied by the difference between the Actual Average Vessel Hours and the Estimated Average Vessel Hours for such Vessel, as so adjusted.

The total actual number of man hours of direct and indirect labor expended by employees of the Contractor in the completion of all the Vessels constructed hereunder shall be determined upon the completion of the construction of all such Vessels and such total actual number of man hours shall be divided by the number of Vessels so constructed in order to determine the Actual Average Vessel Hours for the purposes of this subarticle (B).

The term "man hours of direct and indirect labor" as used herein shall mean the actual hours worked by all employees of the Contractor except the Contractor's corporate officers, its auditor, general manager, general superintendent, superintendents and general foreman, provided, that with respect to employees compensated upon a

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weekly or other salary basis other than those above excluded the number of hours deemed to be "actual hours worked" shall be at the rate of forty-eight hours for each week so compensated.

At the request of the Contractor, the Commission may substitute for the above set forth method of determining adjustments under this subarticle (B) any other method satisfactory to the Contractor should it at any time, in the judgment of the Commission, appear that the results of the methods prescribed in this subarticle (B) do not reflect equitably the amount to be added to or deducted from the base fee by reason of increased or decreased man hours.

The net adjusted fee as calculated under the provisions of this Article shall be subject to deductions on account of expenditures made by the Contractor which shall not be reimbursable to the Contractor as provided in Article 7 hereof, which have been reimbursed to the Contractor and which it has retained, but it is specifically covenanted and agreed that in no event shall the net fee to be paid to the Contractor for each Vessel be less than \$60,000, or more than \$140,000, after the application of all adjustments, additions, deductions, penalties, damages, credits and liabilities of whatever kind, it being further covenanted and agreed that in addition to the net fee per Vessel as herein determined the Commission shall pay the Contractor the full cost of its performance of this contract, with no exclusions or reductions from such cost other than those provided for under the provisions of paragraph B of Article 7 hereof.

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ARTICLE 9.

(a) The Contractor agrees to keep records and books of account on a recognized cost accounting basis satisfactory to the Commission and in conformance with a condensed chart of accounts which the Commission will furnish, showing the actual cost to it of all items of labor, materials, equipment, supplies, services and other expenditures of whatever nature for which reimbursement is authorized under the provisions of this contract. Statement returns relative to expenditures shall be made as and when directed by the Commission.

(b) The Commission and its authorized representatives shall at all times be afforded proper facilities for inspection of the work and shall at all times have access to the premises, work and materials, to all books, records, correspondence, instruction, plans, drawings, receipts, vouchers and memoranda of every description of the Contractor pertaining to said work and all such books, records and other papers shall be the property of the Commission and shall be surrendered by the Contractor upon the completion of this contract and upon delivery to the Contractor of a release by the Commission, but the Contractor shall have the right to make and may retain copies thereof. Upon the completion of this contract the Commission will give the Contractor duly authenticated copies of such books, records and other papers herein mentioned, or in lieu thereof, will at all times thereafter afford the Contractor proper facilities for inspection of the same.

(c) Any duly authorized representative of the Contractor shall be accorded the privilege of examining and

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making copies of the books, records and papers furnished by him to the Commission. All information obtained by the Commission from the Contractor's accounts and records shall be treated as confidential.

ARTICLE 10.

The Commission will make semi-monthly payments as soon as practicable after receipt of certified public voucher covering costs reimbursable to the Contractor under this contract, which have been paid by the Contractor prior to the submission of such voucher, and evidence satisfactory to the Commission of the payment by the Contractor of such costs, provided that payments shall be made more frequently and at any time upon submission by the Contractor of certified public voucher (not made the basis of prior payment), with evidence of payment, in an amount in excess of \$100,000. Any such voucher or part thereof supported by the required evidence shall be paid in any event within 10 calendar days after receipt thereof by the Commission in Washington, D. C.

ARTICLE 11.

Within 15 days after the launching of each Vessel and receipt of public voucher the Commission will pay to the Contractor the sum of \$30,000 on account of the fee payable in respect to such vessel provided for in Article 8 hereof. Within 15 days after the delivery of each Vessel and receipt of public voucher the Commission will make the Contractor a further payment in the amount of \$30,000 on account of such fee. Upon full accounting, which shall be made in any event within six months after the delivery of the last Vessel, the Commission shall pay to the Contractor all balances due it under this contract.

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ARTICLE 12.

(a) All material and workmanship furnished by the Contractor, unless otherwise provided in the Specifications, shall be subject to inspection by inspectors of the Commission at any and all proper times during manufacture or construction at any and all places where such manufacture or construction shall be carried on.

(b) The Contractor shall at the expense of the Commission furnish promptly all reasonable facilities and materials, necessary for the Commission's representatives (including inspectors and auditors), including suitably furnished offices with light, heat, telephone, desks, drawing tables, and filing cabinets.

(c) The Commission shall prepare a full set of See Bee tracings of working plans and bills of material required for the construction of the Vessels and the Commission will furnish the same to the Contractor in accordance with a schedule of dates which will be agreed upon by the Contractor and the Commission within two weeks after the signing hereof. If any changes are made in such plans during the course of construction of the Vessels, the Contractor shall promptly furnish the Commission with new tracings showing such changes.

(d) Any working plans not supplied by the Commission shall, as they are prepared during the progress of the work, be submitted (in such numbers as may be required) to the Commission's representative at the plant, and action thereon by the Commission shall be taken as promptly as possible and in any event within seven days after submission of any such plan.

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(e) The Commission shall promptly pass all work and material conforming to the requirements of this contract, and shall promptly reject all work and material not conforming to the requirements of this contract. The Contractor, at the expense of the Commission, shall promptly correct workmanship which does not comply with the requirements of this contract by making the same comply therewith and shall promptly replace any material or equipment which does not conform to such requirements. The Contractor, at the expense of the Commission, shall promptly take all action necessary for the collection or enforcement of any claim it or the Commission may have against any subcontractor or material man for defective workmanship or equipment furnished by the Contractor, or if required by the Commission will assign such claim to the Commission and authorize the Commission to bring an action thereon at its own expense and in its own name or that of the Contractor.

(f) All inspection and tests by the Commission shall be performed in such manner as not to unnecessarily delay the work.

(g) The Contractor may, with the approval of the Commission, employ a naval architect in connection with the construction of the Vessels to perform such services as may be necessary in connection with the construction of the Vessels and may pay such architect such costs and fees as may be approved by the Commission.

ARTICLE 13.

(a) Title to all Vessels and to all materials, equipment, supplies and all other property assembled at the site of the Facilities or elsewhere for the purpose of being used

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for the construction of the Vessels as well as title to any material, machinery, or equipment ordered for use in connection with the performance of work under this contract to the extent the Commission or the Contractor makes payment therefor, even though delivery thereof has not been made, shall vest in the Commission. These provisions as to title shall not operate to relieve the Contractor of any of its obligations under this contract.

(b) When any payment is to be made hereunder, the Commission, as a condition precedent to making such payment, may, in its discretion, require that affidavits satisfactory to it be furnished by the Contractor showing what, if any, liens or rights in rem of any kind against the Vessels or the materials or equipment on hand for use in the construction thereof have been or can be acquired for on or account of any work done, or any materials or equipment already incorporated as a part of the Vessels, or on hand for that purpose; but it is hereby further stipulated, covenanted and agreed by the Contractor, for itself and on its own account and for and on account of all persons, firms associations, or corporations furnishing labor or material for the Vessels, and this contract is upon the express condition, that no liens or rights in rem of any kind shall lie or attach upon or against the Vessels, or materials or equipment therefor, or any part thereof, or of either, for or on account of any work done upon or about such Vessels, or of any materials or equipment furnished therefor or in connection therewith, or for or on account of any other cause or thing, or of any claims or demands of any kind, except the claims of the Commission: Provided, however, that

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in case by reason of the laws of any State, the Contractor shall be unable to comply with such express condition, the Commission may waive such condition or take such other action as it may deem proper under the circumstances.

ARTICLE 14.

(a) No patented or patent-pending article or device which involves the payment of any license fee or royalty in addition to the purchase price of such article shall be purchased or supplied by the Contractor in connection with the work under this contract without the prior approval of the Commission.

(b) The Commission will pay directly all royalties, license fees or engineering fees for the introduction, construction, use or operation in any of the Vessels of all patented features, devices, apparatus, machinery or equipment which may be furnished by the Commission under the provisions of Article 4 hereof. The Contractor shall pay all other royalties, license fees, or engineering fees for the introduction or use of patented features in the Vessels whether in connection with the method of their design, materials, or their construction or their use and operation, and for the introduction and use of all devices, apparatus, methods and processes employed in connection with the equipment and fitting of each Vessel, if such fees are not paid by the Commission, but any payment so made by the Contractor shall be reimbursed to the Contractor by the Commission.

ARTICLE 15.

Each Vessel shall be built under survey of the American Bureau of Shipping and the Contractor shall allow duly

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authorized representatives of said Bureau access to the Facilities and to the work of subcontractors and to the Vessels at any and all proper times during the performance of this contract. The Commission will pay all fees charged by said Bureau.

ARTICLE 16.

In the performance of the work covered by this contract the Contractor, subcontractors, material men, or suppliers shall use only such unmanufactured articles, materials, and supplies, as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced or manufactured, as the case may be, in the United States; the foregoing provision shall not apply to such articles, materials, or supplies of the class or kind to be used or such articles, materials, or supplies from which they are manufactured as are not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality, or to such articles, materials, or supplies as may be excepted by the head of the Department under the proviso of Title III, Section 3, of the Act of Congress approved March 3, 1933 (41 U. S. C. 10).

ARTICLE 17.

Wherever practicable, the Contractor shall obtain from responsible firms or individuals competent to furnish the materials or equipment, or to undertake the work involved or any part thereof, competitive bids for all materials, equipment, or services required, and shall award orders

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therefor to the lowest satisfactory bidders; provided that as a condition precedent to the award of any order hereunder it shall obtain the approval of the Commission or its duly authorized representative and upon the approval of the Commission or its duly authorized representative the Contractor may award orders upon the basis of market or negotiated prices. There shall be no mingling of purchases covering materials or services required under this contract and those required by the Contractor for other work. The Contractor shall not make any subcontract for part of the work to be performed hereunder or place any order for materials or services calling for a payment without the prior approval of the Commission, but the Commission may prescribe conditions and limitations subject to which orders may be placed without prior approval. The Contractor may purchase any services or materials required for its performance of this contract from any company or companies associated with or affiliated with the Contractor, it being understood that the Contractor shall be entitled to pay to such companies and they shall be entitled to receive reasonable market prices for all services and materials so furnished by them, respectively, to the Contractor with the prior approval of the Commission.

ARTICLE 18.

(a) As a condition to the employment by the Contractor of any person to perform any of the work contemplated by this contract and who will be paid from any funds made available under this contract, the Contractor shall, if the Commission so directs, require such person to execute and to file an affidavit in such form as to satisfy

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the requirements of said Public No. 5 (77th Congress), but the execution and filing of such affidavit shall be without prejudice to the right of the Commission to require such further evidence in the premises as it may deem desirable. The Contractor agrees that in the performance of work hereunder, it will not discriminate against any worker because of race, creed, color or national origin and will require all subcontractors to agree not to so discriminate against any worker. (Executive Order No. 8802, approved June 25, 1941.)

(b) The Commission may require the removal or discharge of any person employed in or about the Facilities if it is determined that the employment of such person is detrimental to the performance of the work under this contract.

ARTICLE 19.

(a) The Contractor shall not employ any person undergoing sentence of imprisonment at hard labor.

(b) The Contractor will report monthly, and will cause all subcontractors to report in like manner, within 5 days after the close of each calendar month, on forms to be furnished by the United States Department of Labor, the number of persons on their respective pay rolls, the aggregate amount of such pay rolls, the man-hours worked, and the total expenditures for materials. He shall furnish to the Department of Labor the names and addresses of all subcontractors on the work at the earliest date practicable: Provided, however, that the requirements of this paragraph shall be applicable only for work at the site of the construction project.

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(c) The Contractor and subcontractors at the site of the construction project will comply with the provisions of Public Act No. 324, 73d Congress, approved June 13, 1934, (48 Stat. 948) and with the provisions of the regulations issued by the Secretary of Labor thereunder, entitled "Regulations Applicable to Contractors and Subcontractors on Public Building and Public Work and on Building and Work Financed in Whole or in Part by Loans or Grants from the United States," published in the Federal Register March 1, 1941.

(d) This paragraph is applicable only to the extent that the performance of this contract is subject to the Bacon-Davis Act (46 Stat. 1494). The Contractor and its subcontractors shall pay all mechanics and laborers employed on work under this contract and directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those which may be determined by the Secretary of Labor pursuant to the provisions of the Act approved March 3, 1931 (46 Stat. 1494) to be the prevailing rates for the various classes of such laborers and mechanics; and the scale of wages to be paid shall be posted by the Contractor in a prominent and easily accessible place at the site of the work. The Commission shall have the right to withhold from the Contractor and subcontractors so much of accrued payments as may be considered necessary by the Commission to pay to laborers and mechanics employed by the Contractor or any subcontractor on the work the difference between the rates of wages required by the

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Contract to be paid laborers and mechanics on the work and the rates of wages received by such laborers and mechanics and not refunded to the Contractor, subcontractors or their agents. The Commission will furnish the Contractor with the wage scale determined by the Secretary of Labor as aforesaid, and until such wage scale is so furnished, the Contractor shall be under no obligations under the provisions of this paragraph.

(e) This contract is subject to the provisions of the Act of June 25, 1936 (Public No. 814), entitled "An Act to provide more adequate protection to workmen and laborers on projects, buildings, constructions, improvements, and property wherever situated, belonging to the United States of America, by granting to the several States jurisdiction and authority to apply their State workmen's compensation laws on all property and premises belonging to the United States of America."

ARTICLE 20.

Until otherwise provided by law, provisions of law prohibiting more than 8 hours of labor in any one day of persons engaged upon work covered by this contract shall, in accordance with the provisions of the Act approved October 10, 1940 (Public No. 831, 76th Cong.), be suspended. The provisions of said Act approved October 10, 1940 are applicable to this contract.

ARTICLE 21.

The Contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or fee, contingent or otherwise. Breach of this warranty shall

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give the Commission the right to terminate the contract, or, in its discretion to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or fee. This warranty shall not apply to commissions payable by contractors upon contracts of sales secured or made through bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business.

ARTICLE 22.

The Contractor covenants that it will have and maintain at all times, sufficient working funds for the carrying out of its obligations hereunder, and will make prompt payment for all labor, materials, services, and other charges which are to be paid under this contract, provided that the Contractor will not be in default under this contract for failure to make such payments if such failure is due to the fact that the Commission has not paid any properly executed voucher payable under the terms of this contract within 10 days of its delivery to the Commission at Washington, D. C. The Contractor hereby agrees that for the purposes of determining costs which shall be reimbursable to it only such working funds used by it in the performance of the work under this contract and two other contracts with the Commission dated March 14, 1941 and May 1, 1941, respectively, as shall exceed the sum of \$1,400,000, shall be interest-bearing funds, it being understood and agreed, however, that such limitation upon the amount of interest-bearing funds shall be in substitution of, and not in addition to, the requirements in respect to commitments or cash loans contained in said two contracts dated March 14, 1941 and May 1, 1941, respectively.

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ARTICLE 23.

The following shall constitute events of default under this contract:

(a) Failure of the Contractor in any respect to use due diligence in proceeding with the performance of the work required under this contract, or failure to perform any of the covenants on its part to be performed hereunder, provided that the commission in either instance shall give notice to the Contractor as to such failure and Contractor shall not within thirty days after being so notified cure such failure.

(b) The filing by the Contractor of a petition in bankruptcy or for reorganization under the Bankruptcy Act or the entry of an order upon petition against the Contractor adjudicating the Contractor a bankrupt, or the appointment of a receiver or receivers of the Contractor or any property belonging to the Contractor necessary for the performance of its obligations under this agreement.

ARTICLE 24.

(a) Upon the occurrence of any of the events of default set forth in Article 23 hereof the Commission may terminate this contract and enter upon the site of the Facilities referred to in the Facilities Contract and take possession thereof as well as of any Vessels either completed or uncompleted and any machinery, materials, fittings, equipment and supplies theretofore or thereafter delivered at the site of the Facilities to be incorporated in the construction or the equipment of the Vessels, or to be used in connection therewith, together with all plans, specifications, calculations and other records re-

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quired for the construction or equipment of the Vessels. The termination of this contract, pursuant to the provisions of this Article, shall terminate the Facilities Contract in accordance with the terms of Article 23 thereof, and in such event the rights and obligations of the parties under the Facilities Contract shall be those stipulated in said Article 23 in case of the occurrence of an event of default thereunder. Subsequent to termination under this Article the Contractor shall not have any right to use or occupy the premises on which the Facilities or any part thereof shall have been erected or constructed. In the event that such premises or any part thereof have been leased by the Contractor from third parties, the Contractor shall promptly execute an assignment of the lease or leases to said premises, which assignment shall be satisfactory in form and substance to the Commission. In the event that said premises or any part thereof are owned by the Contractor, but leased to the Commission, any permit, permission or license theretofore granted by the Commission to the Contractor to use said premises during the term of such lease shall automatically terminate upon termination of this contract hereunder, and the Commission shall have the right to use and occupy the premises as lessee of the Contractor under the terms of any lease which it may have with the Contractor.

(b) As soon as is practicable after termination of this contract pursuant to the provisions of this Article the Commission will make an audit of the Contractor's accounts and pay to him an amount equal to all costs not theretofore paid by the Commission to which the Contractor may then be entitled under the provisions of Ar-

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ticle 7 hereof. After the effective date of termination the Contractor shall receive no further payments on account of the fee provided for in Article 8 hereof and all rights of the Contractor to receive any such payments shall cease and determine except that the contractor shall be entitled to such payments on account of its fee as shall have accrued by reason of launchings or deliveries of Vessels launched or delivered prior to such effective date of termination.

(c) The Commission may waive the right to terminate the contract and take possession upon default, or may exercise such right and subsequently permit the Contractor to resume the performance of this contract without prejudice to the Commission's right to take such possession at a later time for the same or any subsequent default.

ARTICLE 25.

The Commission may at any time prior to the completion of the work to be performed cancel this contract upon written notice to the Contractor. Upon the effective date of such cancellation the Contractor shall stop all work hereunder except as otherwise directed by the Commission. In the event of cancellation under this Article, the Contractor shall be paid all costs reimbursable under Article 7 hereof which have been incurred prior to the effective date of cancellation or which are incurred by him in the performance of work directed to be done by the Commission in completing partially completed vessels or which he may be required to pay or be liable for the payment of by reason of such cancellation. In the event of cancellation pursuant to this Article 25 the Commission

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shall pay to the Contractor as compensation for its work and services under this contract the following fees:

- (i) With respect to each Vessel completed and delivered hereunder, the sum of \$110,000 per Vessel, less any payments which have been made on account of Contractor's fee respecting any such Vessel.
- (ii) With respect to each Vessel partially completed on which work has been stopped under the provisions of this Article a fee equal to \$110,000 multiplied by the percentage of work completed on such Vessels. In determining the percentage of work completed, account will be taken of materials on hand whether partially worked or not and allowance will be made for items furnished by the Commission and delivered to the Contractor.

The provisions of this Article in respect to the fee payable on cancellation shall not apply to any renewal or extensions of this Contract, such fee to be determined by negotiation in the event of any such renewal or extension.

ARTICLE 26.

In the event that during the course of the work hereunder the Facilities shall be destroyed or so damaged as to prevent work on the Vessels for an estimated period of 90 days or more, the Commission may elect to terminate this contract or have the Contractor reconstruct or repair the Facilities.

If the Commission shall elect to have the Facilities reconstructed or repaired by the Contractor the Contractor shall be paid the cost of the reconstruction or repair work.

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If the Commission shall elect to terminate the contract the payments to be made to the Contractor shall be determined in accordance with the provisions of Article 25 hereof.

ARTICLE 27.

No member of or delegate to Congress, nor Resident Commissioner, shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, except as provided in Section 116 of the Act approved March 4, 1909 (35 Stats. 1109). No member of or delegate to Congress, nor Resident Commissioner, shall be employed by the Contractor either with or without compensation as an attorney, agent, officer, or director. (Sec. 805(e), Merchant Marine Act, 1936.)

ARTICLE 28.

The Contractor may, in its discretion, and shall, if and as required by the Commission, secure fidelity and other similar bonds, workmen's compensation, public liability, and automobile liability insurance and such other insurance as may be required by the laws of the state in which the Facilities are located. The Contractor may also obtain other insurance against liabilities of the Contractor to any third person for any cause whatsoever except liabilities adequately covered by insurance provided by the Commission for benefit of itself and the Contractor. The Contractor shall also secure such other insurance as the Commission may direct or approve.

The Contractor shall have no duty to insure against risk of loss of or damage to any property of the Commission including, without limitation, the Facilities and Vessels or any part thereof unless the Commission shall, in

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writing, direct the Contractor to insure such property, and then only to the extent and in the manner directed. The Commission hereby releases the Contractor from any liability on account of loss of or damage to any property of the Commission not covered by insurance.

All insurance required pursuant to instruction of the Commission shall at all times be maintained with companies, underwriters, or underwriting funds, in amounts and under forms of policies, satisfactory to the Commission.

The Contractor shall not be deemed to have warranted the validity or coverage of any such insurance. In the event that any of the insurance required by the Commission hereunder by reason of any act, omission, or negligence of the Contractor shall not be kept in full force and effect, the Contractor shall pay to the Commission all losses and indemnify the Commission against all claims and demands which would otherwise have been covered by such insurance.

ARTICLE 29.

In the event of any dispute or difference of opinion between the parties hereto as to any matter or thing arising out of or relating to this contract, or any provision hereof, which cannot be settled between the parties themselves (except disputes as to the occurrence of an event of default under Article 23 hereof which disputes shall not be the subject of arbitration) they shall submit the matter in dispute to arbitration by three disinterested arbitrators, each of the parties hereto to choose one arbitrator and the two so chosen to choose the third

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arbitrator. The party desiring such arbitration shall give to the other party written notice of its desire, specifying the question or questions to be arbitrated and naming the arbitrator chosen by it.

Within a reasonable time thereafter, not exceeding twenty (20) calendar days, the other party shall give in like manner like written notice specifying any additional questions to be arbitrated and naming the arbitrator chosen by it.

If a party hereto shall fail to appoint an arbitrator within twenty (20) calendar days after the other party shall have so given such written notice of its desire to arbitrate, the party having appointed the arbitrator may thereupon request the American Arbitration Association to appoint the arbitrator for the party in default and such Association shall thereupon appoint such arbitrator. The two arbitrators thus chosen shall then select the third. In the event that the two arbitrators chosen by or for the parties hereto fail, within ten (10) calendar days, to select the third arbitrator, the third arbitrator, upon written request of either party hereto, shall be appointed by the American Arbitration Association. Should said American Association cease to exist or fail or refuse for a period of twenty (20) days to appoint an arbitrator after having been requested to do so by either party hereto, in the manner herein provided, then such party may request any judge of any United States Circuit Court of Appeals to appoint such arbitrator, which judge shall thereupon be fully authorized to make such appointment. The decision of any two of the three arbitrators thus chosen when reduced to writing and signed by them shall be final, conclusive and binding upon both parties hereto.

(Defendant's Exhibit A)

The arbitrators so appointed shall determine which party shall assume the expenses of such arbitration or the proportion of such expenses which each party shall bear; and the arbitration expenses so allocated shall be paid direct by the party or parties by which the same are directed to be paid.

In Witness Whereof, the parties hereto have executed five original counterparts of this agreement as of the day and year first above written with the intent that each of them shall have full force and effect independently of the others; but full performance of one shall be deemed full performance of all.

UNITED STATES MARITIME COMMISSION

By: E. S. LAND

Chairman

Attest:

W. C. PEEP, JR. (Seal)

Secretary

CALIFORNIA SHIPBUILDING CORPORATION

By: S. D. BECHTEL

President

Attest:

PAUL S. MARRIN (Seal)

Asst. Secretary

Approved as to Form:

WADE H. SKINNER

Assistant General Counsel

U. S. Maritime Commission

Case No. 5870. Mills vs. Calship. Deft's Exhibit.
Date 5/8/47. No. A in Evidence. Clerk, U. S. District
Court, Sou. Dist. of Calif. P. D. Hooser, Deputy Clerk.

District Court of the United States
Southern District of California
Central Division

United States of America
Southern District of California—ss:

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing is a full, true, and correct copy of Defendant's Exhibit A, filed in Case No. 5870-M Civil, Louise E. Mills, etc., Plaintiff, vs. California Shipbuilding Corporation, Defendant, on May 8, 1947, as the same appears from the original record remaining in my office.

Witness my hand and the seal of said Court, this 19th day of November, A. D. 1947.

(Seal)

EDMUND L. SMITH

Clerk

By R. B. Clifton

Deputy Clerk

[Endorsed]: No. 11794. United States Circuit Court of Appeals for the Ninth Circuit. Joshua Hendy Corporation, a corporation, Appellant, vs. Louise E. Mills, Administratrix of the Estate of Thomas C. Mills, Deceased, Appellee. Louise E. Mills, Administratrix of the Estate of Thomas C. Mills, Deceased, Appellant, vs. Joshua Hendy Corporation, a corporation, Appellee. Transcript of Record. Upon Appeals From the District Court of the United States for the Southern District of California, Central Division.

Filed November 21, 1947.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit

In the Circuit Court of Appeals for the United States
in and for the Ninth Circuit

No. 11794

JOSHUA HENDY CORPORATION, a corporation,
Appellant,

vs.

LOUISE E. MILLS, et al.,

Appellee.

APPELLANT'S POINTS ON APPEAL

Appellant in the above entitled action, in compliance with Rule 19, Subdivision 6, of the Rules of Practice of the above entitled Court, herewith submits its Points on Appeal.

The District Court erred:

1. In ruling that Thomas C. Mills or the appellant were engaged in the production of goods for interstate commerce or in processes and occupations necessary to such production, within the meaning of the Fair Labor Standards Act of 1938, as amended.

2. In ruling that the activities of Thomas C. Mills during his one-half hour lunch periods were compensable activities within the meaning of the Fair Labor Standards Act of 1938, as amended.

3. In ruling that the Court had jurisdiction of appellee's claim without a finding that the lunch period activities of Thomas C. Mills were compensable by either an express provision of a written or non-written contract or by a custom or a practice within Section (2) of the Portal-to-Portal Act of 1947.

4. In ruling that the activities of Thomas C. Mills during his lunch periods were compensable within the meaning of the Fair Labor Standards Act of 1938, as amended, since the Court expressly found that said Thomas C. Mills was compensated by appellant for only activities performed during his regular shift excluding said lunch period activities.

5. In ruling that witnesses could testify as to what activities Thomas C. Mills performed during his lunch periods when it was shown they were never at any time present with Thomas C. Mills during said periods.

6. In finding that Thomas C. Mills did not eat his lunch each day during his one-half hour lunch period.

Dated: December 2, 1947.

THELEN, MARRIN, JOHNSON & BRIDGES
ROBERT H. SANDERS & SAMUEL S. GILL

Robert H. Sanders

Attorneys for Appellant

Address:

215 W. 6th Street (1004)

Los Angeles 14, California

Received copy of the within Appellant's Points on Appeal this 3 day of December, 1947. Mohr & Borstein & Perry Bertram, by Perry Bertram, Attorneys for Appellee.

[Endorsed]: Filed Dec. 5, 1947. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause]

STIPULATION AND ORDER THAT PLAINTIFF'S
EXHIBIT "1" MAY BE CONSIDERED BY
COURT WITHOUT INCLUSION IN RECORD

It is stipulated and agreed by and between counsel for the respective parties to the above entitled action that because Plaintiff's Exhibit "1", the complete personnel and employment record of Thomas C. Mills, deceased, contains much matter that is not material to the issues involved in the Appeal and Cross Appeal of the above entitled case, that said Plaintiff's Exhibit "1" need not be designated for inclusion in the printed Record on Appeal if the above entitled court will so order that said exhibit will be considered in its original form without inclusion in the said printed Record on Appeal. In the event that this stipulation is not approved by the above entitled court, it is the desires of both parties to the above entitled action that said Plaintiff's Exhibit "1" be included in the printed Record on Appeal.

Dated: December 2, 1947.

THELEN, MARRIN, JOHNSON & BRIDGES
ROBERT H. SANDERS, SAMUEL S. GILL

Robert H. Sanders

Attorneys for Appellant

Address:

215 W. 6th Street (1004)

Los Angeles 14, California

MOHR & BORSTEIN & PERRY BERTRAM

Perry Bertram

Attorneys for Appellee

Address:

744 Chamber of Commerce Building

Los Angeles 15, California

It Is So Ordered.

Dated: Dec. 5, 1947.

FRANCIS A. GARRECHT
Senior United States Circuit Judge

[Endorsed]: Filed Dec. 5, 1947. Paul P. O'Brien,
Clerk.

In the Circuit Court of Appeals for the United States
in and for the Ninth Circuit

No. 11794

JOSHUA HENDY CORPORATION, a corporation,
Appellant and Cross-Appellee,

vs.

LOUISE E. MILLS

Appellee and Cross-Appellant.

CROSS-APPELLANT'S STATEMENT OF
POINTS ON APPEAL

Cross-Appellant hereby in the above entitled action, in compliance with Rule 19, Subdivision 6, of the Rules of Practice of the above entitled Court, herewith submits her Statement of Points on Cross-Appeal.

I. The Court erred in granting the motion of defendant, Joshua Hendy Corporation, made after the conclusion of the trial to file an amended answer setting up an additional affirmative defense not supported by any evidence introduced upon the trial.

II. The Court erred in finding that the omission on the part of the defendant to pay the overtime wages due was in good faith and upon reasonable ground for believing that said omission was not a violation of the Fair Labor Standards Act.

III. The Court erred in denying cross-appellant liquidated damages equal to the amount of unpaid overtime wages.

IV. The Court erred in not awarding a fee for the services of cross-appellant's attorney substantially greater than \$75.00.

Dated: December 9, 1947.

WEINSTEIN & BERTRAM

By Perry Bertram

Attorneys for Cross-Appellant

Address:

1151 South Broadway

Los Angeles 15, California

[Affidavit of Service by Mail.]

[Endorsed]: Filed Dec. 11, 1947. Paul P. O'Brien,
Clerk.



No. 11794.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JOSHUA HENDY CORPORATION, a corporation,

Appellant,

vs.

LOUISE E. MILLS, Administratrix of the Estate of
Thomas C. Mills, deceased,

Appellee.

APPELLANT'S OPENING BRIEF.

THELEN, MARRIN, JOHNSON & BRIDGES,
SAMUEL S. GILL,
ROBERT H. SANDERS,

215 West Sixth Street, Los Angeles 14,
Attorneys for Appellant.

FILED

DEC 18 1948

PAUL P. O'BRIEN, CLERK

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No. 11794.
IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JOSHUA HENDY CORPORATION, a corporation,
Appellant,

vs.

LOUISE E. MILLS, Administratrix of the Estate of
Thomas C. Mills, deceased,
Appellee.

APPELLANT'S OPENING BRIEF.

I.

**Statement of Basis of Original and Appellate
Jurisdiction.**

This is an appeal from the final judgment [R. 25] and the findings of fact and conclusions of law [R. 20-24, incl.] entered in the above-entitled proceedings by the United States District Court for the Southern District of California, Central Division, on September 11, 1947.

Appellee contended in the District Court that that court had jurisdiction of this action under the Fair Labor Standards Act of 1938 and by the provisions of Section 24(8) of the Judicial Code (28 U. S. C., Sec. 41(8)). It is the position of appellant herein that the District Court did not have jurisdiction of this action by reason of the provisions of Section 2 of Public Law 49, 80th Congress, Chapter 52, which withdrew jurisdiction of this action from the District Court.

Mr. Mills, now deceased, worked at appellant's shipyard as an engineer both in the steam plant and the air compressor plant. He was paid for all time during his regular shift, but was not paid for one-half hour allowed for eating lunch [R. 8]. His duties in the steam plant required him to watch gauges and manipulate valves [R. 37-38]. He carried his lunch and ate it on the job [R. 39, 40, 50, 57, 94]. He had an office with a desk and a chair where he ate his lunch and at the same time watched the gauges [R. 43, 47]. In this office, he also made coffee which he had from time to time during the day [R. 48-49]. It was his understanding that he could eat his lunch during the shift, but that he would have to stay in the vicinity of the boiler at all times [R. 43, 49, 81]. This was in accordance with the customary practice of steam plant engineers [R. 71].

Mr. Mills' duties in the air compressor plant were to watch the voltage, water and oil systems of the machines [R. 76, 77]. He carried his lunch and ate it at a chair and desk from which point he could watch the operations of the machines [R. 81]. He was not required to make repairs on the machines [R. 78].

At all times during his employment, Mr. Mills worked under provisions of a Union contract [R. 85, 97]. There was no agreement between the appellant and the Union that the men should have relief while they ate their lunch [R. 85]. The Union had representatives in the shipyard at all times [R. 94]. At no time during the employment of Mr. Mills was any claim made by the Union or any of the individual employees performing work as engineers that they should be paid for an additional half hour each day [R. 98].

III.

Specification of Errors Relied Upon.

1. The Court erred in its conclusion of law [R. 23] that

“Jurisdiction of this action is conferred upon the court by the Act and by Section 24 (8) of the Judicial Code (28 U. S. C. Sec. 41 (8).)” [Points on Appeal number 3, R. 179.]

2. The Court erred in its conclusion of law that

“The activity engaged in by Thomas C. Mills during each of his one-half hour lunch periods for which he received no compensation was a compensable activity within the meaning of the Act, as amended by the Portal-to-Portal Act of 1947 (Public Law 49, 80th Cong., Chap. 52).” [R. 23, Points on Appeal number 2, R. 179.]

3. The Court erred in its conclusion of law that

“Thomas C. Mills was employed by the defendant in the production of goods for interstate commerce and in processes and occupations necessary to such production within the meaning of the Act.” [R. 23, Points on Appeal number 1, R. 179.]

4. The Court erred in failing to find that Mr. Mills did not eat his lunch each day during the shift [Points on Appeal number 6, R. 180].

IV.

Summary of Argument.

Neither appellant nor Mr. Mills were at any time engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act. The cargo ships and troop transports which were being constructed at the shipyard were weapons of war and were produced for the use of the United States Navy in carrying on World War II. Such production was for naval and military use and did not constitute production of goods for commerce.

By the provisions of Section 2 of the Portal-to-Portal Act of 1947 (Title 29, U. S. C. Sec. 252), Congress relieved employers from liability and withdrew jurisdiction from the District Courts to enter any judgment based upon a claim under the Fair Labor Standards Act for any activity unless it was compensable by either an express provision of a written or a nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or by a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with the written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer. It was further provided that an activity should be considered as compensable under such contract provision or such custom or practice only when it was engaged in during the portion of the day with respect to which it was so made compensable.

In this action, the claim arose prior to May 14, 1947. There are no allegations in the pleadings that it was

based upon an activity compensable by an express provision of a written or nonwritten contract or by a custom or practice. Furthermore, there is no evidence in the record to support any such allegations and the Court failed to make any findings as to such facts. Therefore, the Court had no jurisdiction to make or enter a judgment in this action.

V.

Argument.

A. THE PRODUCTION OF SHIPS WAS FOR MILITARY AND NAVAL USE.

The Fair Labor Standards Act applies only to employees who are engaged in commerce or engaged in the production of goods for commerce. The burden of establishing such facts is placed upon the plaintiff. *Warren-Bradshaw Co. v. Hall* (1942), 317 U. S. 88. In this case, the employee was engaged solely in the production of cargo ships and troop transports for the use by the United States as weapons of war. The production of the instrumentalities of war does not constitute the production of goods for commerce. *Divins v. Hazeltine Electronics Corp.* (C. C. A. 2d, 1947), 163 F. (2d) 100.

In the *Divins* case, the Court made a distinction between war ships and cargo ships. It is our position that the distinction is not sound. Our contention is supported by the United States Supreme Court in *Northern Pacific Railway Co. v. United States* (1947), 91 Law Ed. (Adv. Ops.) 667. In this case, the Court made it clear that cargo ships as well as battleships were a military or naval

property of the United States. With reference to the procurement of ships by the United States Maritime Commission, the Court stated (91 Law Ed. p. 671):

“But it is well known that procurement of military supplies or war materials is often handled by agencies other than the War and Navy departments. Procurement of cargo in transport vessels by the Maritime Commission is an outstanding example.

“Civilian agencies may serve the armed forces or act as adjuncts to them. The Maritime Commission is a good example. The Army and Navy on foreign shores or in foreign waters cannot live and fight without a supply fleet in their support. The agency, whether civilian or military, which performs that function is serving the armed forces. The property which it employs in that service is military or naval property, serving military or Naval functions.”

The Court held that certain property was “military or Naval” property and that it was “moved for military or Naval” use within the meaning of Section 321(a) of the Transportation Act of 1940.

Thus, it is clear that the ships constructed by the appellant were for “military or Naval” use and that their production was not for commerce but was for “military or Naval use”.

Furthermore, the definition of “goods” (Section 3(i) of the Fair Labor Standards Act, Title 29, U. S. C. Sec. 203) does not include “goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.” In the instant case, the appellant was at no time the owner of the goods; the materials, parts and

supplies which were fabricated into ships were at all times owned by the United States and the ships when constructed merely remained the property of the United States. The United States was the ultimate consumer and was not a producer, manufacturer or processor. The ships and materials from which they were fabricated were delivered into the actual physical possession of the United States. Therefore, the ships were not "goods" within the meaning of the Act.

B. THE APPLICATION OF SECTION 2 OF THE PORTAL-TO-PORTAL ACT.

In order to relieve employers of liability for claims accruing prior to May 14, 1947, under the Fair Labor Standards Act, Congress enacted Section 2 of the Portal-to-Portal Act (Title 29, U. S. C. Sec. 252):

"(a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after May 14, 1947), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to May 14, 1947, except an activity which was compensable by either—

"(1) an express provision of a written or non-written contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

"(2) a custom or practice in effect, at the time of such activity, at the establishment or other place

where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

“(b) For the purposes of subsection (a) of this section, an activity shall be considered as compensable under such contract provision or such custom or practice only when it was engaged in during the portion of the day with respect to which it was so made compensable.

“(c) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employed an employee there shall be counted all that time, but only that time, during which the employee engaged in activities which were compensable within the meaning of subsections (a) and (b) of this section.

“(d) No court of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after May 14, 1947, to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, under the Walsh-Healey Act, or under the Bacon-Davis Act, to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under subsections (a) and (b) of this section.”

The legislative history of the Act shows that Congress intended to eliminate all claims other than those based upon express contract provision or custom or practice. The relief from liability was not limited to claims for walking time and preliminary and postliminary time.

Before the whole House of Representatives, Representative Gwynne, the Chairman of the House Committee handling the bill, made the following statement with respect to the final bill which had come from the Conference Committee:

“The first part of the bill has to do with existing portal-to-portal claims which you will recall *are defined as causes of action or claims seeking pay for activities which activities at the time they were performed were not compensable either by custom or practice in the place of employment, or by contract between the employer and the employee or his representative.*” (Emphasis added.)

“The bill as it comes from the conference bans all existing claims of such character.” (Cong. Rec. Vol. 93, p. 4513.)

In response to questions from Representative Pace, Mr. Gwynne stated:

“In existing claims, the entire thing is barred, even though the so called portal-to-portal claim may arise in the middle of the day, during the hours for which the man is employed. The whole thought is that those claims are all barred, I mean as to existing claims as to activities for which the employer has not agreed to pay. . . .” (Cong. Rec. Vol. 93, p. 4514.)

Moreover, it is clear that the intent was to make no distinction between so-called productive and non-productive time. Mr. Gwynne so stated before the House:

“I would think the words in the gentleman’s amendment to distinguish between productive and nonproductive time would have a very unfortunate effect. Nonproductive time is just as compensable as purely productive time. But the distinction we have tried to make is between activities for which there was an understanding that they were to be paid by express agreement or by custom or practice.” (93 Cong. Rec. p. 1621.)

It was also made clear in the Senate debates that all claims other than those based upon contract, custom or practice were eliminated.

“Mr. Lucas. I wish to ask the Senator about the bill as it has been reported by the committee, and I have specific reference to section 2 (a) of part II. I ask him whether he believes that every conceivable claim based on any activity not compensable by contract or custom or practice, is wiped out by the bill. I am now talking about all claims over and beyond those which are set forth in the portal-to-portal suits, and I wish to know whether the bill includes such claims.

“Mr. Donnell. The answer, Mr. President, is that the section to which the Senator from Illinois has referred destroys every claim under either the Fair Labor Standards Act of 1938—or perhaps I should say it provides that no employer is subject to any liability or punishment under the Fair Labor Stand-

ards Act of 1938 as amended, the Walsh-Healey Act, or the Bacon-Davis Act on account of the failure of the employer to pay to an employee minimum wages or to pay an employee overtime compensation for or on account of any activities that an employee engaged in prior to the date of the enactment of the act, except those that were compensable by either contract, custom, or practice, as described in that section.

“Mr. Lucas. Then the Senator from Missouri and I are in agreement as to what this section means. In other words, any and all claims, over and above and beyond anything that has happened in these portal-to-portal suits, are also wiped out or outlawed, so to speak.” (93 Cong. Rec. p. 2194.)

“Mr. Tydings. Let me put it this way: Does the bill now pending before the Senate take away from either employer or employee any rights which were given to him originally, but which we did not mean to give him, to the extent of the portal-to-portal suits as we have come to know them?”

“Mr. Donnell. . . . But the real purpose of this proposed legislation is to dispose of the existing portal-to-portal cases, and we do not see any way to do except to take the entire activities of the entire 24-hour day, and provide by law that none of them shall be compensable unless by contract or custom.”

“Mr. Tydings. It is in the ‘twilight zone,’ so to speak where payment has not been made in prior practice, and where payment is not provided for in the contract, and therefore the question arises as to whether or not in good faith the employer and the employee assume that payment could be made under the Wages and Hours Act, in that twilight zone?”

That is primarily I believe the place from which most of these suits have sprung, from the twilight zone, rather than practice or contractual obligation; and it is particularly in that twilight zone that the committee is attempting now to legislate to clear up that matter. Is that a broad statement of the situation?

“Mr. Donnell. I appreciate that one man may use an expression differently from the way another man uses it. I do not regard it as a ‘twilight zone.’ I should say that recognizing the grave economic problem, what we do is to undertake to wipe out all pending portal-to-portal cases, so far as it is humanly possible to do so. In order to do that, we find it necessary to provide that any activity which is not compensable, either by contract, or by custom or practice not inconsistent with the contract, shall not be compensable. Does that answer the Senator’s question?”

“Mr. Tydings. That pretty well answers it, because, although I take it the committee might like to have considered each case all over the country on its merits, in the nature of things it had to take action, and the fairest way it could act in the interest of employer and employee was to take the cases that came in the real category of right, and put them to one side, and in all the questionable cases, as to who was right and wrong, which were not covered by contract or were not covered by prior practice, the committee said, ‘We will knock all these out, because it is impossible to run a line through all of them with exact justice.’”

“Mr. Donnell. I think the Senator has very clearly stated the situation. . . .” (93 Cong. Rec. pp. 2196-2197.)

The statement accompanying the Conference Report bears out these observations and makes it clear that claims for activities during the middle of the day or lunch period may be wiped out.

“Clarifying Provisions

“The conference agreement (section 2 (b)) contains a provision not stated expressly in either bill, that an activity shall be considered as compensable under the above referred to contract provision or custom or practice only when it was engaged in during the portion of the day with respect to which it was so made compensable. Under this provision, for example, if under the contract provision or custom or practice an activity was compensable only when engaged in between 8 and 5 o'clock but was not compensable when engaged in before 8 or after 5 o'clock, it will not be considered as a compensable activity when engaged in before 8 or after 5 o'clock. So also, if under the contract provision or custom or practice an activity was compensable when engaged in before 8 but was not compensable when engaged in after 5 o'clock, it will not be compensable under the bill as agreed to in conference when engaged in after 5 o'clock. So also, if under the contract provision or custom or practice an activity was compensable during a certain portion of the regular workday but was not compensable when engaged in during other hours of the regular workday, it will not be compensable under the bill as agreed to in conference when engaged in during such other hours.” (93 Cong. Rec. p. 4371.)

The Wage and Hour Administrator has recognized this intent:

“the provisions of section 2 (a) (b) of the Portal Act differ from the corresponding provisions of section 4,

relating to future claims, in that their scope is not confined to activities engaged in outside the workday proper, but extends to such activities engaged in at any time during the 24 hours of the day.” (12 Fed. Reg. 7667.)

In this case, the evidence establishes that there was no custom or practice to pay for one-half hour during the shift allowed for lunch. Furthermore, there is no evidence of any “*express provision*” of contract making such time compensable. Compensability for an activity can not be implied. As pointed out in the statement accompanying the Conference Report with reference to Section 2(c):

“This provision is in the nature of a clarifying statement . . . to make it clear that only such time will be counted for the purposes of applying the minimum wage and overtime compensation provisions of the three acts, and that it therefore will not be possible by judicial or administrative interpretation to include other time which was not made compensable under the rules above stated.” (93 Cong. Rec. p. 4371.)

The District Court obviously attempted to make a distinction between so-called productive and nonproductive work [R. 18]. Congress, as pointed out, did not make any such distinction. The Conference Report shows that Congress did not intend that the courts should imply that activities are compensable as the District Court has done in this case. Moreover, the evidence does not support such implication. The engineers were represented by a Union whose representatives were always in the shipyard. They made no objection to the practice of disallowing a half-hour for lunch which the engineers understood would be eaten on the job.

It is respectfully submitted that in order to establish a claim over which this Court has jurisdiction, the employee must establish the following facts: (1) that the activity is compensable by contract provision which must be express and cannot be implied; or that the activity is compensable by custom or practice; and (2) that the activity is so made compensable for the period of the day for which the claim is made.

None of the above facts has been established in this case and the Court has made no such findings of fact. Therefore, it is clear the jurisdiction of the Court has not been established.

Conclusion.

We respectfully submit that the judgment of the District Court must be reversed on the following grounds:

1. That the employee upon whose claim the action is based was at no time engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act;

2. That there is a complete lack of evidence and there is no finding of fact to support the jurisdiction of the Court inasmuch as such jurisdiction was withdrawn from the District Courts by Section 2 of the Portal-to-Portal Act except in those cases where the activity upon which the claim was based was compensable by an express contract provision or custom or practice.

Dated at Los Angeles, California, March 16, 1948.

Respectfully submitted,

THELEN, MARRIN, JOHNSON & BRIDGES,
SAMUEL S. GILL,
ROBERT H. SANDERS,

Attorneys for Appellant.

No. 11794

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOSHUA HENDY CORPORATION, a corporation,

Appellant.

vs.

LOUISE E. MILLS, Administratrix of the Estate of
Thomas C. Mills, Deceased,

Appellee.

BRIEF OF APPELLEE AND CROSS- APPELLANT.

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FILED
APR 23 1943

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No. 11794

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOSHUA HENDY CORPORATION, a corporation,

Appellant.

vs.

LOUISE E. MILLS, Administratrix of the Estate of
Thomas C. Mills, Deceased,

Appellee.

BRIEF OF APPELLEE AND CROSS- APPELLANT.

I.

Statement of Basis of Original and Appellate Jurisdiction.¹

This action was filed pursuant to the provisions of Section 16(b) of the Fair Labor Standards Act of 1938, hereinafter sometimes referred to as the Act.² Jurisdiction vested in the District Court by that section and by Section 24(8) of the Judicial Code (28 U. S. C., Sec. 41(8)).

¹Applicable to both Appeal and Cross-Appeal.

²Public No. 718, 75th Cong., Chap. 676, 52 Stat. 1060-1069 (1938), 29 U. S. C., Secs. 201-219.

Subsequent to the trial of the action and before decision, the Portal-to-Portal Act of 1947³ became law. Section 2 of the Portal Act, as it will sometimes herein be referred to, withdraws jurisdiction of certain overtime wage claims previously enforceable under the Fair Labor Standards Act. Whether or not the District Court had jurisdiction of this claim depends upon whether the “activities” for which compensation was awarded were “compensable” within the meaning of the Portal Act, as the trial Court found.

This Court had jurisdiction of the appeal and cross-appeal under the provision of Section 128 of the Judicial Code (28 U. S. C., Sec. 225).

II.

Statement of the Case.⁴

A. QUESTIONS INVOLVED ON THE APPEAL, AND MANNER IN WHICH RAISED.

1. Was the construction of cargo vessels by the appellant for the United States Maritime Commission “production of goods for commerce” within the meaning of the Fair Labor Standards Act?

This issue is raised by the pleadings, the statement of issues [R. 7], and the findings of fact and conclusions of law.

2. Is there any evidence to support the Court’s judgment that the activities for which compensation was awarded, were “compensable activities?”

³Pub. Law 49, 80th Cong., Chap. 52.

⁴Applicable to both Appeal and Cross-Appeal.

This issue is raised by the record, the findings of fact and the conclusions of law.

3. If it were to be construed to deprive Mr. Mills of his compensation under the facts of this case, is Section 2 of the Portal Act constitutional?

B. QUESTIONS INVOLVED ON THE CROSS-APPEAL AND MANNER IN WHICH RAISED.

1. Did the Court err in permitting appellant to amend its answer after the trial by setting up the defense of "good faith" where there was no evidence to support such defense?

This issue is raised by the motion to amend, by the amended answer and by Cross-Appellant's Statement of Points on Appeal.

2. Is there any evidence to support the Court's finding that defendant's failure to compensate plaintiff's decedent was "in good faith"?

This issue is raised by the findings of fact and conclusions of law, and by Cross-Appellant's Statement of Points on Appeal.

3. Is cross-appellant entitled to liquidated damages in addition to the unpaid compensation?

This issue is raised by the pleadings, the findings of fact and conclusions of law, and by Cross-Appellant's Statement of Points on Appeal.

4. Should the trial Court have awarded an attorney's fee larger than \$75.00 for the services of appellee's counsel in the Court below?

This issue is raised by the judgment and by Cross-Appellant's Statement of Points on Appeal.

C. STATEMENT OF FACTS.

Appellee does not propose to re-state the facts, some of which are recited in Appellant's Brief in a light favorable to appellant's position [R. 3-4]—but will simply confine herself to certain corrections and additions deemed material.

Appellant's statement that the cargo vessels and troop transports were built as weapons of war is not complete. They were built for carrying on the commerce of the United States as well, as the contract between the Maritime Commission and appellant explicitly stated. [Deft. Ex. A, pars. 1 and 2 of the Recitals, R. 135.]

The Commission could not hire or fire employees [Deft. Ex. A], and if any employees actually were discharged at the request of the Commission [R. 100], it was simply in fulfillment of the appellant's obligation to the Commission to use precaution for security purposes. [Deft. Ex. A, Art. 2(e), R. 138; *Ibid.*, Art. 18(a)(b), R. 165-6.] Similarly, the Commission had no power to establish rates, but simply required plaintiff not to pay more than certain approved rates [Deft. Ex. A, Art. 5, R. 146] nor other than certain rates established by law. [Deft. Ex. A, Art. 19(d), R. 167.]

The only purposes for which the Commission had its representatives in appellant's shipyard were to protect its costs on the "cost plus" contracts and for "security": "After all," Appellant's Industrial Relations Officer testified, "we were supposed to be running the yard." [R. 100.]

It is apparent that Mr. Mills may have eaten his lunch at odd moments during his shift. However, it is clear and uncontradicted that he was not relieved of his duties at all and never had more than five or ten minutes uninterrupted at any one time.

III.

The Appeal.

A. SUMMARY OF ARGUMENT.

Thomas C. Mills was employed by the appellant in the production of goods for interstate commerce. Ships are goods as defined by the Fair Labor Standards Act. These goods produced by appellant were transported out of the State. Further, the ships were built to and do carry on the commerce of the United States.

The duties which kept Mr. Mills from having a lunch period were compensable activities. Mr. Mills was engaged at an hourly rate, and appellant expressly agreed to pay him that rate for each hour he worked. It did not pay him for the lunch period in which it required him to work, in violation of its agreement with him.

If Section 2 of the Portal Act were to be so construed as to require other and further agreements beyond the appellant's agreement to pay Mr. Mills so much per hour and to pay him time and one-half for work beyond his basic "workday," coupled with the orders and requirement that he perform his regular duties during his lunch period, that section would be in violation of the Fifth Amendment to the Constitution.

B. ARGUMENT.

1. *Appellant's Production of Ships Was the Production of Goods for Interstate Commerce.*

Section 3(i) of the Fair Labor Standards Act defines "goods" to include ships; Section 3(b) defines "commerce" to include "transportation [or] transmission . . . among the several States or from any State to any place outside thereof."

So it has been held that the construction of cargo vessels and troop transports for the Maritime Commission under contracts substantially the same as Defendant's Exhibit A, constitutes the production of goods for interstate commerce.

St. Johns River Shipbuilding Co. v. Adams (C. C. A. 5, 1947), 164 F. (2d) 1012.

It is immaterial that title to the goods produced was in the United States government.

Divins v. Hazeltine Electronics Corp. (C. C. A. 2, 1947), 163 F. (2d) 100.

Even apart from the fact that these ships were produced not only to aid in carrying on the war, but also specifically "to carry on the commerce of the United States," this production was for commerce because the ships were transported out of the State.

Bailey v. Porter (N. D. Ill., 1947), 13 Labor Cases, paragraph 63,874;⁵

Timberlake v. Day & Zimmerman (D. C. Ia., 1943), 49 F. Supp. 28;

Lasater v. Hercules Powder Co. (E. D. Tenn., 1947), 13 Labor Cases, paragraph 63,946.⁵

⁵Official Reporter Citation not available.

Moreover, even had the defendant been engaged in producing combat vessels rather than vessels suitable for carrying on the commerce of the United States, and even if the definitions of the Act confined "commerce" to business or commercial transactions, the activities of Mr. Mills would have been within the coverage of the Act. This Court in *Ritch v. Puget Sound Bridge & Dredging Co., Inc.* (C. C. A. 9, 1946), 156 F. (2d) 334, pointed out numerous ways in which the Navy as such was engaged in "commerce" in that restricted sense.

On April 14, 1948, Judge Leon R. Yankwich, in *J. H. Devine v. Joshua Hendy Corp.* (S. D. Cal., Civ. No. 6176-Y), held in an oral opinion (judgment not yet signed at the date of printing of this brief) that the appellant here, which is the defendant in that case, was engaged in producing goods for commerce.

Appellant places its reliance on *Northern Pacific Railway Co. v. U. S.* (1947), 330 U. S. 248. In this case the Court had to determine whether or not the Government was entitled to reduced freight rates under the Transportation Act of 1940 on the theory that the materials were "military or Naval property" "moved for military or Naval use."

One need seek no further than the opinion in that case for the complete answer to appellant's argument.⁶ The

⁶Appellant's basic premise that "commerce" as used in the Act is applicable only to commercial or business transactions and not to production for war, is in itself erroneous. The Act is applicable to commerce in its full constitutional sense and in that sense "it is immaterial whether or not the transportation is commercial in character." *Walling v. Haile Gold Mines* (C. C. A. 4), 136 F. (2d) 102. Thus, the power of Congress under the Commerce clause extends to the transportation across State lines of one's own personal goods, *U. S. v. Hill*, 248 U. S. 420; of people, *Ed-*

Supreme Court there rejected the petitioner's interpretation of the statutory definition based upon "other Congressional enactments under which such materials were excluded because not mentioned, or were included by specific reference." It referred to "the different wording of those Acts and the different ends they served," as well as to the principle that acts dealing with public grants must be construed strictly against the grantee and in favor of the Government.

Similarly, in *U. S. v. Powell* (1947), 330 U. S. 238, the Court dealing with the same problem this time rejected the Government's position, stating that the definitions in the Lend-Lease Act could not aid in interpreting the different definition in the Transportation Act.

So, here, the definitions of "goods," "commerce" and "production for commerce" contained in the Fair Labor Standards Act are completely different from the definition of "military or naval property" in the Transportation Act; the two statutes serve different purposes; the Fair Labor Standards Act being remedial is to be broadly construed to extend its benefits, while the Transportation Act is to be strictly construed against the carrier.

The logical result of appellant's argument would require a holding that the Fair Labor Standards Act becomes inapplicable in time of war because under modern conditions virtually all production is directed toward the prosecution of the war. As the Court, in the *Northern*

twards v. California, 314 U. S. 160; of a woman for immoral purpose but not commercialized vice, *Caminetti v. U. S.*, 242 U. S. 470; of a stolen automobile, *Brooks v. U. S.*, 267 U. S. 432; of a kidnapped person, *Gouch v. U. S.*, 297 U. S. 124; and of information, *International Textbook Co. v. Pigg*, 217 U. S. 91.

Pacific R. R. Co. case said, "Pencils as well as rifles may be military property."

Not only does the *Northern Pacific R. R. Co.* case fail to support appellant's contention, but the evidence is overwhelming that Congress intended the Act to apply to the production of armaments and other vital war materials delivered to the United States. During the war, some eighteen bills were introduced in Congress for the purpose of suspending or restricting the overtime provisions of the Act.⁷ Such amendments would have been unnecessary had the existing Act not applied to workers producing war goods for the Government. Furthermore, the enactment of the Portal Act itself demonstrates that Congress did not question the applicability of the Act to employees of cost-plus-a-fixed-fee contractors with the Government. Sec. 1(a)(9) of the Portal Act contains a finding by Congress with reference to "the cost to the government of goods and services heretofore and hereafter purchased by its various departments and agencies" and concludes that "the public treasury would be seriously affected by consequent *increased cost of war contracts*." (Emphasis added.)

Thus, it is obvious that Congress, both during and after the war, never doubted that the Act covers employees of cost-plus contractors with the Government who were engaged in the production of goods used in the prosecution of the war.

⁷Senate Bills Nos. 2232, 2373, and 2884, and House Resolution Nos. 6617, 6689, 6790, 6792, 6795, 6796, 6814, 6823, 6826, 6835, 7054, and 7731 of the 77th Congress, 2d Session; Senate Bills 190 and 237, and House Resolutions 992 of the 78th Congress, 1st Session.

2. *Thomas C. Mills Was Employed in Activities During His Lunch Periods Which Were Compensable Under the Portal-to-Portal Act.*

The evidence establishes without contradiction that Thomas C. Mills had no lunch periods; that he was not relieved of his duties for any portion of his workday; that he performed the duties for which he was hired and which were required by the appellant throughout his workday, including the half-hour lunch periods which were allowed other employees at appellant's shipyard; and that he was paid for one-half hour less than the number of hours which he worked each day.

The trial Court found these to be the facts, and, in accordance with the parties' stipulation, that Mr. Mills was employed at certain hourly rates.

On this evidence and these findings it concluded that the activity for which Mr. Mills was not compensated was a compensable activity within the meaning of the Fair Labor Standards Act, as amended by the Portal-to-Portal Act. [R. 23.]

Appellant claims that Section 2 of the Portal-to-Portal Act bars appellee's claim.

An analysis of that section demonstrates that the Court's Conclusions and Judgment are correct and follow necessarily from the evidence.

Section 2(a) of the Portal Act relieves employers of liability to compensate for activities of an employee engaged in prior to May 14, 1947, "except an activity which was compensable by either (1) an express provision of a written or non-written contract . . .; or (2) a custom or practice . . ." The question under this subsection is simply whether or not the employee's claim is

for activities *of the type* for which appellant agreed to pay him.

In the face of the record, appellant cannot seriously contend that the activities for which compensation was awarded were not the type for which appellant agreed to pay. All four witnesses (Alcott, Anderson, Gilham and Hill) who testified as to Mr. Mills' activities, stated unequivocally that throughout the shift, including the lunch period, Mr. Mills performed the duties for which he was hired and which he was directed to perform. These were the duties for which appellant agreed to and did pay him. No other conclusion could be drawn from the evidence but that the activities in question were compensable by the express provisions of his contract, whether written or not,⁸ or by the custom or practice in the establishment.

Section 2(a) being satisfied, the question under Section 2(b) is, was the activity compensable during the lunch period?

First, appellant must agree that the Portal Act does not eliminate *all* claims under the Fair Labor Standards Act for activities performed prior to May 14, 1947. Section 2 plainly states it does not. Congress contemplated that employment agreements, written or oral, or custom or practice, *then and previously in effect*, did provide for compensation, and therefore, for liability under the Act as amended by the Portal Act.

⁸There was a written collective bargaining agreement covering Mr. Mills' employment. [R. 98, 115, 117, and see Appendix to this Brief.] It did not describe what activities each class of employees was paid for, and this phase of the employment relationship was covered by the day-by-day oral instructions given them by their foremen and superintendents.

What type of agreement or custom or practice, then and previously in effect, satisfies Section 2(b)?

Mr. Mills was employed at an hourly rate. This, in itself, is an agreement to pay so much for each hour or part of an hour spent by the employee in the duties for which he was engaged. This agreement, coupled with the express instructions and orders by the defendant to perform those duties during his lunch period, is the express agreement contemplated by Section 2(b).

What appellant is asking the Court to hold is that each time an employer wanted his employee to work overtime he must have repeated to him that he would pay for the work, in order that the time be counted as hours worked. Bearing in mind that Section 2 deals with past transactions, appellant, appellee, and the Court, being realistic, all know that such a rule would mean that Congress had, in spite of the language of Section 2 of the Portal Act, eliminated *all* claims.

The fact is that the employer and employee both understand that the original hiring agreement expressly obligates the employer to pay the hourly rate for every hour he orders his employee to work, and that is precisely the situation here. As Mr. Gilham testified about the lunch period, "That is the half hour that we was supposed to be paid for that we never got. Some of them did and part of them didn't . . ." [R. 56.]

In *Conwell v. Central Missouri Telephone Co.* (W. D. Mo., Mar. 10, 1948), 14 Labor Cases, Paragraph 64,399,⁹ the plaintiffs were two night telephone operators working on eleven-hour night shifts, receiving pay for eight hours

⁹Official Reporter Citation not available.

(later nine and nine and one-half), the balance being designated as sleeping time. The switchboards were busiest in the first half of the shift, tapering off toward morning. Sometimes the plaintiffs had two or three hours without interruption during which they slept. Other times they were disturbed too frequently to sleep. They could not leave their posts and had to attend to whatever calls came in. The practice of not paying for the three hours designated as sleeping time had continued for about twenty years. The Court gave judgment for all of the unpaid "sleeping time" on the basis of principles stated when it had previously denied defendant's motion to dismiss, 74 F. Supp. 542. The Court's opinion concerning the application of the Portal Act to the telephone operators is particularly pertinent here:

"It is difficult to conclude that the Congress of the United States intended to deny jurisdiction of the Court over legitimate claims of employees who had actually worked many hours in excess of forty hours permitted by the Fair Labor Standards Act. Nowhere was it insisted during the consideration of the [Portal] Act that such claims were unfair or unjust or outside the scope of the Fair Labor Standards Act, nor were there any expressions indicating a desire to destroy any such claims, or the jurisdiction of the Court with respect thereto except in so far as it was necessary to deny jurisdiction with respect to the Portal-to-Portal pay cases which were not seeking compensation for actual services rendered for productive labor, but for travelling and waiting time and for other activities outside actual productive activities."

It is also interesting to note, both with respect to what has been said concerning the informal agreements covering Mr. Mills' employment, and with respect to the collective bargaining agreement hereafter to be discussed, what Judge Duncan in the *Central Missouri Telephone* case said concerning the identical argument here made by appellant:

"If defendant is correct as to the legislative intent, then no person other than the organized groups whose compensation and working hours and conditions are fixed by working agreements would be able to enforce his right to overtime pay for time actually and legitimately earned under the Fair Labor Standards Act prior to the passage of the Portal-to-Portal Act." (74 F. Supp. 542 at 544.)

Moreover, the written collective bargaining agreement covering Mr. Mills' employment expressly provided for compensation for time worked in excess of his regular shift.¹⁰

In the case of *Frank v. Wilson & Co., Inc.*, decided in the Northern District of Illinois in 1948,¹¹ Judge Igoe had before him claims governed by a contract containing

¹⁰Because the trial was had before the Portal Act became law, and its provisions were not, of course, known to counsel, it was not deemed necessary to delay proceedings for the purpose of obtaining and offering in evidence a copy of said agreement. Counsel for both parties to this action have stipulated in other litigation involving identical and similar claims against this defendant that the collective bargaining agreement, pertinent portions of which appear in the Appendix, covered the employment of all defendant's hourly-rate employees. *Felix A. Tully, et al. v. Joshua Hendy Corp.*, S. D. Cal., Civ. No. 5931-O'C; *J. H. Devine, et al. v. Joshua Hendy Corp.*, S. D. Cal., Civ. No. 6176-Y.

¹¹14 Labor Cases, Paragraph 64,296; Official Reporter Citation not available.

substantially the same provisions as Paragraph "4" of this contract. In that case the employees were employed in the defendant's mechanical division with scheduled working hours of 8 A. M. to 12 Noon, and from 12:30 P. M. to 4:30 P. M. The defendant required all employees to be dressed in working clothes prior to punching the time clock, and to punch the clock before commencing work. A rule of the defendant required the employees to be dressed and ready to go to work at 7:55 A. M., five minutes before the start of the shift. They were paid only for the time following 8 A. M. The employment contract provided, as did the one here, for a basic workday of eight hours, and a basic workweek of forty hours, and that all time worked in excess of those hours would be paid for at the rate of time and one-half. The Court held that the five minutes during which the employees were required to be at their place of employment before their shift started were compensable within the meaning of the Portal Act by the terms of the written contract between the parties, and also by virtue of custom and practice, although the employees had never been paid for that time.

In *Devine v. Joshua Hendy Corp.* (S. D. Cal., No. 6176-Y, Apr. 14, 1948), Judge Leon R. Yankwich announced his decision (findings and judgment not yet signed) that the provisions of Sections 4 and 5 of the collective bargaining agreement between the defendant, which is the appellant here, and its employees [see Appendix] was the agreement contemplated by Sec. 2 and that employees who worked over and beyond the shift hours for which defendant paid were entitled to overtime compensation for that excess work.

The interpretation of the Portal Act by Judge Igoe in the Northern District of Illinois, by Judge Duncan in the Western District of Missouri, by Judge Yankwich in the Southern District of California, and by Judge McCormick in this case, is sound in principle because it recognizes the fact that Congress did provide that certain claims remained enforceable and that contracts such as those before two of the Courts were virtually the only types of contracts making provision for overtime compensation. Any contrary rule would, it is believed, prevent any employee from recovering overtime compensation for activities performed prior to May 14, 1947, and should therefore be rejected.

3. *The Right of Mr. Mills to Receive Overtime Compensation for the Work Which He Performed for Appellant Was a Vested Property Right. If the Portal Act Were to Be Construed to Bar His Recovery Herein It Would Be in Violation of the Fifth Amendment to the Constitution.*

Since antiquity, there has been an aversion in jurisprudence to laws operating retroactively.¹² Guided by this feeling the Greeks held invalid legislation subsequently enacted to relieve the Athenian Ambassadors of a penalty prescribed by law in effect at the time the acts were committed. Roman law included the same principle illustrated by several prohibitions laid down by the *Corpus Juris Civilis*.

¹²What follows concerning the development of this abhorrence toward retrospective legislation is digested from a critical historical analysis by Dr. Elmer E. Smead, Instructor in Political Science, Dartmouth College, appearing in 20 Minn. L. Rev. 775. Authority for the statements here made are there fully annotated.

Bracton in his *De Legibus* served to carry the doctrine into the English common law. It was given wide acceptance through Coke who announced it as a legal maxim, which seemed to him to be so obviously just as to be beyond criticism. Blackstone stated it as a principle of justice which was irrefutable. The English courts, however, employed the doctrine as a rule of construction, and not as a limitation on the *power* of Parliament.

It remained for the American courts, unhampered by any rule of legislative sovereignty and having available the institution of judicial review, to employ the principle in the defense of vested rights by incorporating into it a system of limitations on legislative action. (Interestingly enough this expanded doctrine found its way back to, and was adopted by, the English courts.)

In the development in the common law of this antipathy to retroactive operation of laws, the doctrine came to be identified with "natural law," and thus given a transcendental nature as described by Chancellor Kent in *Dash v. Van Kleeck* (1811), 7 Johns (N. Y.) 477. While in relatively few cases did the Supreme Court invalidate legislation as being contrary to "natural law," statutes violating this principle were held to be contrary to the *ex post facto*, the contract, or the due process clauses of the United States Constitution.

There can be no doubt that Section 2 of the Portal Act, if applied in the manner suggested by appellant, is "retrospective" legislation in the classic Storian definition: "Upon principle, every statute, which takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new

disability in respect to transactions or considerations already past must be deemed retrospective.¹³

Appellee fully recognizes that many decisions, including decisions of the Supreme Court, have upheld legislation which at first blush appeared to violate this cardinal principle.¹⁴ Further, at first blush, many of such decisions appear to be indistinguishable in principle from the many contrary decisions which did invalidate statutes on the ground that they work a deprivation of property without due process of law because they are retrospective in operation.

The discussion of the problem at issue here will be predicated on these premises:

The "due process" clauses of the Fifth and of the Fourteenth Amendments have the same meaning. Precedents under one are equally controlling as precedents under the other.

Curry v. McCanless (1939), 307 U. S. 357, 369-370;

Bowles v. Willingham (1944), 321 U. S. 503, 518.

The right to compensation as provided by the Fair Labor Standards Act in effect at the time the work is performed is a vested property right, and causes of action

¹³*Society for the Propagation of the Gospel in Foreign Parts v. Wheeler* (1814), 2 Gall. C. C. 105, 139.

¹⁴While several district courts have held Section 2 unconstitutional, the large majority have upheld its validity. These cases are not here cited or discussed because for the most part the decisions were made on pleading questions—motions to dismiss or for summary judgment. The basic principles which govern the problem are not established by those decisions, but by the authorities discussed in the text.

accruing thereunder are property of which an employee cannot be deprived without due process of law.¹⁵

Brooklyn Savings Bank v. O'Neil (1944), 324 U. S. 697;

Reid v. Solar Corp. (N. D., Iowa, 1946), 69 F. Supp. 626, 637.

It will be claimed that Mr. Mills' right to be paid at the rate of time and one-half for his work in excess of forty hours in a week was a "statutory" right and not a vested property right, and as such could be withdrawn by Congress at any time before it ripened into judgment.¹⁶

¹⁵That causes of action in general are property which cannot be divested without due process of law see:

Pritchard v. Norton (1882), 106 U. S. 124;

Anderson v. Ott (1932), 127 Cal. App. 122, 15 P. (2d) 526, 528;

Scammon v. Commercial Union Assurance Co. (1880), 6 Ill. App. 551;

Devlin v. Morse (1931), 254 Mich. 113, 235 N. W. 812, 813;

Seaman v. Clarke (1901), 60 App. Div. 416, 69 N. Y. S. 1002, 1004;

Town of Walton v. Adair (1904), 96 App. Div. 75, 89 N. Y. S. 230.

¹⁶In support of its claimed power to divest employees of their previously accrued right to compensation under the Fair Labor Standards Act, in the manner provided by Section 2 of the Portal Act, Congress was referred by Senate Report No. 37 to:

Norris v. Crocker (1851), 13 How. 429;

U. S. ex rel. Rodriguez v. Weekly Publications, Inc. (C. C. A. 2, 1944), 144 F. (2d) 186;

National Carloading Co. v. Phoenix-El Paso Express (1943), 142 Tex. 141, 176 S. W. (2d) 564, cert. den. 322 U. S. 747;

In re Joseph T. Hall (1896), 167 U. S. 38;

Western Union Tel. Co. v. L. & N. R. R. Co. (1922), 258 U. S. 13;

Maryland v. B. & O. R. R. Co. (1845), 3 How. 534.

The leading cases which have been cited as authority for the sweeping generalization that rights created by statute may be withdrawn (see note 16) do not support the application of that rule to the claim of Mr. Mills. In those cases the courts held it within the constitutional power of Congress or the state to terminate the right because the right existed in favor of the state and could be waived and released by the state (*Maryland v. B. & O. R. R. Co.*, 3 How. 534); because the right existed against the sovereign and the sovereign could withdraw its consent to be sued (*In re Hall*, 167 U. S. 38); because the statutory right of condemnation conferred upon a public utility by its nature became complete only upon final judgment (*Western Union Telephone Co. v. L. & N. R. R. Co.*, 258 U. S. 13); or because the right was to recover a penalty created by statute (*Norris v. Crocker*, 13 How. 429; *United States ex rel. Rodriguez v. Weekly Publications, Inc.*, 144 F. (2d) 186; *National Carloading Co. v. Phoenix-El Paso Express*, 142 Tex. 141).

The only cases of possible pertinency would be those dealing with penalties and it has uniformly been held that neither the overtime compensation nor the liquidated damages required by the Act are "penalties" created by statute.

Overnight Transportation Co. v. Missel (1942),
324 U. S. 572;

Brooklyn Savings Bank v. O'Neil (1945), 324
U. S. 697;

Culver v. Bell & Loffland, Inc. (C. C. A. 9, 1944),
146 F. (2d) 29.

The statutory rights which might thus be terminated are rights having an infirmity inherent in their nature and totally apart from the fact that they were created by stat-

ute. Numerous rights created by and existing solely by virtue of a statute are not so affected. As to them a deprivation without due process violates either the Fifth or the Fourteenth Amendments as the case may be.

In *Fletcher v. Peck* (1810), 6 Cranch 87, the State of Georgia had by authority of a statute conveyed land to James Gunn and others. Thereafter the statute was repealed and annulled and the conveyance declared void. A new act conveyed title to Peck who deeded to Fletcher. The Court held Peck liable on his covenants of title because the original title created by the first statute could not be divested by subsequent legislation.

Lynch v. United States (1933), 292 U. S. 571, was an action by beneficiaries of yearly renewable term insurance policies issued during World War I under the War Risk Insurance Act of 1917. Prior to the commencement of these suits, Congress enacted the Economy Act of 1933, providing in part that "all laws granting or pertaining to yearly renewable term insurance are hereby repealed." The courts below dismissed the actions for lack of jurisdiction. The Supreme Court reversed, holding that the war risk policies were property, created vested rights and could not be taken without just compensation.

In *Ettor v. Tacoma* (1912), 228 U. S. 148, the plaintiff had sued for damages to his property caused by original street grading. At the time the grading was done a Washington statute required cities to pay for such damage. Pending the litigation, and apparently during the trial, the statute was amended to provide that it would not apply to original grading. The Court said:

"The necessary effect of the repealing act as construed and applied by the Court below, was to deprive the plaintiffs in error of any remedy to enforce the fixed liability of the city to make compensation. This

was to deprive the plaintiffs in error of a right which had vested before the repealing act, a right which was in every sense a property right. Nothing remained to be done to complete the plaintiff's right to compensation except the ascertainment of the amount of damage to their property. The right of the plaintiffs in error was fixed by the law in force when their property was damaged for public purposes, and the right so vested cannot be defeated by subsequent legislation." (Citing cases, p. 156.)

In *Coombes v. Gets* (1932), 285 U. S. 434, it was held that the repeal of certain provisions in the California Constitution fixing shareholders' liability for officers' defalcations could not affect the rights of creditors arising prior to the repeal. This would be a denial of due process as well as an impairment of the obligations of contract.

In *Ginsberg v. Lindel* (C. C. A. 8, 1939), 107 F. (2d) 721, a petition in bankruptcy had been filed two months after the passage of the Chandler Act, one provision of which restricted a landlord's priority for rent to rent accrued within three months of the petition. Before the passage of that act the landlord's priority was governed by state law allowing twelve months. It was held that the lessor's statutory lien for twelve months accrued rent was a vested property right which could not be taken by Congress without violating the Fifth Amendment. The Court said, "The further contention that a right created by statute may be annulled by statute is equally erroneous in so far as the argument implies that vested property rights may be destroyed. . . . Congress in the exercise of the bankruptcy power is bound by this principle [of due process] and may not take a property right from one creditor and transfer it without compensation to another without violating the Fifth Amendment."

Cox v. American Dredging Co. (1910), 80 N. J. L. 645, 77 Atl. 1025, involved rights created by an act of 1788 which gave owners of meadows already banked in the right to maintain the banks at the expense of all owners. An act passed in 1904 amended the original statute by providing that landowners might be relieved of liability upon application. This was held to be an unconstitutional deprivation of property without due process.

It is obvious, therefore, that "statutory" rights and "vested property" rights are not mutually exclusive concepts. To support the constitutionality of retrospective legislation it is not sufficient to cite authorities in which the rights permitted to be withdrawn were tagged as "statutory." However the right arose, whether by statute, by contract, by tort or in some other manner is immaterial; those seeking to uphold the validity of retroactive laws abolishing rights must demonstrate that those rights are not "property" in the constitutional sense. We believe that the authorities here cited clearly establish that Mr. Mills' right to compensation in the manner required by the law in effect when his services were rendered is property in the full constitutional sense.¹⁷

What then of Section 2(d)? Is the Court helpless because Congress "may give, withhold or restrict jurisdiction at its discretion," and because such "jurisdiction, hav-

¹⁷One need not determine whether or not the right to compensation for "portal" activities, as that term came to be popularly understood following the "portal" decisions culminating in the *Mt. Clemens Pottery* case (1946), 326 U. S. 680, is "property" in this sense and thus beyond the power of Congress to invade. The time for which the Court found Mr. Mills entitled to be paid was spent by him in actual work and service for the employer within the traditional common law concept. Mr. Mills' claim, therefore, was not based upon any new theory or application of the law, and was not what Congress thought of as "windfall."

ing been conferred, may, at the will of Congress, be taken away in whole or in part . . .”? *Kline v. Burke Construction Co.* (1922), 260 U. S. 226.

The question answers itself. The power of Congress to “ordain and establish” inferior courts, conferred by Article III, Section 1, can no more be exercised in violation of the Fifth Amendment than can the other congressional powers.¹⁸ An effective remedy to enforce a right is as much guaranteed by the “due process” clause as the right itself.

In *Gibbes v. Zimmerman* (1933), 290 U. S. 326, a South Carolina statute had provided for certain procedure whereby the state receiver might take over banks and enforce shareholders’ liability to depositors. Following the bank holiday proclaimed by the President, a statute was passed establishing a different procedure involving considerably longer time in which the depositors might obtain redress. This was held not to be a violation of due process, the Court saying, “The appellant has no property in the constitutional sense in any particular form of remedy; all that he is guaranteed by the Fourteenth Amendment is the preservation of the substantial right to redress by some effective procedure.” (Citing cases, p. 332.)

In our district, Judge Leon R. Yankwich has put it this way, “. . . a vested cause of action is property and is protected from arbitrary interference . . . [a claimant] is guaranteed by the Fourteenth Amendment

¹⁸Each grant of power in the Constitution may be exercised only within the limits of the other Constitutional provisions. *Lindner v. United States* (1925), 268 U. S. 5, 17; *McCulloch v. Maryland* (1819), 17 U. S. 317, 423. This limitation has been applied, among others, to the power to tax, *Child Labor Tax Cases* (1922), 259 U. S. 20, and to the power to spend, *Butler v. United States* (1936), 297 U. S. 1.

the preservation of his substantial right to redress by some effective procedure.”

United States v. Standard Oil of California (1937), 21 F. Supp. 645, aff'd 107 F. (2d) 402, cert. den. 60 S. Ct. 715.

An analysis of the cases upholding the withdrawal of jurisdiction reveals that invariably some effective remedy was left. *Kline v. Burke Construction Co.* (1922), 260 U. S. 226, is most often cited in support of the complete power of Congress to withdraw jurisdiction from the federal courts. There, however, an action was also pending in the state court over the same subject matter. The claim was that the refusal, pursuant to statute, of the District Court to enjoin the state action might take away the right of a decision in federal court between citizens of different states, since the state action might be decided first and a plea of *res judicata* raised. The Court held that there was no constitutional right to a judgment in federal court—but note that the remedy in either court remained available.

In *Lockerty v. Phillips* (1942), 319 U. S. 182, the Court upheld the provision of the Emergency Price Control Act which conferred exclusive jurisdiction in the Emergency Court of Appeals. Since a forum was provided, it was not necessary that the forum be the district courts.

The principle applicable here is well expressed in *Bowles v. Miller* (C. C. A. 10, 1945), 151 F. (2d) 992,

“The remedy provided in one act of Congress for the enforcement of a right may be changed or modified, *provided a substantial remedy is left*. There is no inhibition against an act of Congress operating retroactively in making reasonable changes in the

remedy for the enforcement of a right *provided a reasonable remedy is made available.*" (p. 993. Emphasis added.)

Consider, too, the cases holding invalid legislation changing statutes of limitation to the extent that the period has run prior to the enactment. Such statutes must either begin to run on actions on or after the date of enactment or must leave a reasonable time after enactment for the filing of actions previously accrued. Otherwise, by destroying the remedy they destroy the rights back of the remedy.

Sohn v. Waterson (1873), 17 Wall. 596;
Terry v. Anderson (1877), 95 U. S. 628;
Mitchell v. Clark (1884), 110 U. S. 633;
McGahey v. Virginia (1890), 135 U. S. 662;
Ochoa v. Hernandez y Morales (1913), 230 U. S. 139;
United States v. St. Louis, S. F. & T. Ry. Co.
(1926), 270 U. S. 1.

If the destruction of the remedy resulting from a shortening of the period of limitations is a denial of due process, likewise is the destruction of the remedy resulting from the withdrawal of jurisdiction.

In Section 2(d), Congress has left no remedy and has thus destroyed the right: "No court of the United States, of any State, Territory or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action . . . to enforce liability . . . on account of the failure of an employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938 . . ." This provision, therefore, likewise violates the Fifth Amendment and is not a valid exercise of Congressional control over the jurisdiction of the federal courts.

Accordingly, if, as appellant contends, the language of Section 2 cannot be construed to embrace Mr. Mills' work as "compensable activities," in so limiting the concept of compensable activities with respect to past transactions and in destroying all remedy with respect thereto, this portion of the Portal Act is an unconstitutional deprivation of Mr. Mills' property without due process of law.

IV.

The Cross-Appeal.

1. THE CROSS-APPELLANT IS ENTITLED AS A MATTER OF RIGHT TO LIQUIDATED DAMAGES BECAUSE THERE IS NO EVIDENCE TO WARRANT AN INFERENCE THAT THE FAILURE TO PAY THE WAGES WHEN DUE WAS IN GOOD FAITH AND WITH REASON TO BELIEVE THAT IT WAS NOT IN VIOLATION OF THE LAW.

Section 11 of the Portal Act provides:

"In any action commenced prior to or on or after the date of the enactment of this Act to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 16(b) of such Act."

The Portal Act contains no definition of "good faith" and it is doubtful whether judicial definitions under different statutes, ranging from "absence of fraud" to a re-

quirement of positive action¹⁹ would be helpful. At all events, there is no evidence in the record from which an inference of good faith under whatever definition is adopted may be drawn.

Further, cross-appellee failed to show any grounds, least of all reasonable grounds, for believing its failure to pay Mr. Mills was not a violation of the Act. Indeed, it did not attempt to show that it had such belief.

In Interpretative Bulletin No. 13, first issued May 3, 1939, revised October, 1939, October, 1940, and November, 1940,²⁰ the Administrator of the Wage-Hour Division stated:

“As a general rule, hours worked will include (1) all time during which an employee is required to be on duty or to be on the employer’s premises or to be at a prescribed workplace, and (2) all time during which an employee is suffered or permitted to work whether or not he is required to do so. In the large majority of cases, the determination of an employee’s working hours will be easily calculable under this formula and will include in the ordinary case, all hours from the beginning of the workday to the end with the exception of periods when the employee is relieved of all duties for the purpose of eating meals.”

The Court decisions have been uniform in holding that all time spent in “productive” activity must be counted in determining the amount of overtime payable.²¹

¹⁹See 18 *Words and Phrases* 475-498.

²⁰Revoked 1947 since the passage of the Portal Act.

²¹Indeed, the rule is so obviously not open to dispute that few courts have been called upon to decide it. Whether any courts will feel that the Portal Act requires a different holding in some cases remains to be seen.

See, for example:

Fleming v. Rex Oil and Gas Co. (D. C. Mich., 1941), 43 F. Supp. 950;

Sunshine Mining Co. v. Carver (D. C., Ida., 1941), 41 F. Supp. 60;

Walling v. Blue Mountain Logging Co. (D. C., Wash., 1942), 6 Labor Cases, Par. 61,466.

All courts which have passed upon the point have held or expressed the opinion that lunch periods must be counted as time worked unless the employee is relieved of all duties for a sufficient length of time to devote uninterruptedly to his own purposes.

Lofton v. Seneca Coal and Coke Co. (N. D. Okla., 1942), 6 Labor Cases, par. 61,271, aff'd (C. C. A. 10, 1943), 136 F. (2d) 359;

Walling v. Dunbar Transfer & Storage, Inc. (D. C. Tenn., 1943), 7 Labor Cases, par. 61,565;

Sunshine Mining Co. v. Carver (D. C. Ida., 1941), 41 F. Supp. 60;

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Armour & Co. v. Wantock (1944), 323 U. S. 126;

Skidmore v. Swift & Co. (1944), 323 U. S. 134;

Fox v. Summit King Mines (C. C. A. 9, 1944), 143 F. (2d) 926.

In this state of the law, without a single voice to the contrary, it would have been difficult to accept from cross-appellee, had it been tendered, a profession of "good faith" or an expression that it had reason to believe it was not violating the law when it failed to pay Mr. Mills for his work during his lunch periods.

2. IN VIEW OF THE LEGAL ISSUES INVOLVED AND THE RESULTS ACCOMPLISHED THE AWARD OF \$75.00 FOR ATTORNEY'S FEES WAS INSUFFICIENT.

The recovery of judgment herein involved the proof of the claim by witnesses other than the employee because of his demise, the preparation of a Pre-trial Stipulation of Facts, of a Pre-trial Memorandum of Law, and a trial of one day. Thereafter, the Portal Act was passed and briefs were prepared covering not only the basic right to compensation but the effect of the new act on that right. Arguments were had on cross-appellee's motion to amend its answer after the trial and later upon the points raised in the trial briefs. As a result of these proceedings, judgment was awarded the plaintiff.

It is respectfully submitted that in the sound discretion of the trial court a substantially larger fee should have been awarded.

IV.

Appellee's Counsel Are Entitled to Further Attorney's Fees on Appeal.

It is the function of this court to fix a reasonable sum as the value of the legal services rendered to the appellee by her counsel upon this appeal.

E. H. Clarke Lumber Co. v. Kurth (C. C. A. 9, 1945), 152 F. (2d) 941;

Republic Pictures Corp. v. Kappler (C. C. A. 8, 1945), 151 F. (2d) 543;

Stanger v. Vocafilm Corp. (C. C. A. 2, 1945), 151 F. (2d) 894.

Counsel for appellee respectfully request that an order be made that appellant be required to pay an additional sum in an amount to be determined by the Court for the services of appellee's attorneys on this appeal.

V.

Conclusion.

This claim is not for activities of the "portal" type: it does not involve walking time, travel time, clothes changing time, clock punching time, "make-ready" time or any such preliminary activity. The claim is for the work which Mr. Mills was hired and directed to do. It therefore meets the test of Section 2(a) of the Portal Act as being of the type and nature which was expressly made compensable by the express provisions of the employment contract and by the custom and practice in the plant.

The employer had agreed to pay Mr. Mills his hourly rate for each hour that it required him to work. Moreover, the collective bargaining contract called for overtime payment for work in excess of the basic shift and the work shift was defined to exclude the lunch period. Thus when the employer required and directed Mr. Mills to work during his lunch period the agreement made the work compensable for that time. This met the test of Section 2(b).

Mr. Mills' right to recover the wages and liquidated damages due him for the services which he rendered to his employer at the latter's insistence was property in the constitutional sense. If it were possible to sustain appellant's contention that this right is destroyed by the Portal Act, to that extent appellee is deprived of her property without due process of law in violation of the Fifth Amendment. Just as that right cannot be destroyed so also the attempt to destroy the remedy is not a valid exercise by Congress of its control over the jurisdiction of the courts.

The record contains no evidence to justify an inference that the employer acted in good faith or had reason to be-

lieve that its failure to pay Mr. Mills was not a violation of the law. It was mandatory therefore to award liquidated damages.

In the exercise of its sound discretion, the Court below should have awarded a substantially greater attorneys' fee for the services rendered in the trial. It is the function of this Court to fix a further fee for the services of appellee's counsel rendered upon the appeal.

Wherefore, it is respectfully submitted that the judgment should be affirmed with respect to the award of unpaid overtime compensation, that it should be reversed with respect to the denial of liquidated damages with instructions to award such damages, and that attorneys' fees commensurate with the services in the Court below and on this appeal be determined.

Respectfully submitted,

MOHR & BORSTEIN, and
PERRY BERTRAM,

By PERRY BERTRAM,

Attorneys for Appellee and Cross-Appellant.



APPENDIX.

PARAGRAPHS 4 AND 5 OF UNION AGREEMENT.

Between California Shipbuilding Corporation, appellant herein, as employer, and the Metal Trades Department of the American Federation of Labor, representing its employees.

4. Hours of Employment and Overtime

Forty (40) hours shall constitute a work week, eight (8) hours per day, five (5) days per week, Monday to Friday, inclusive, between the hours of 8 A. M. and 5 P. M., except that where, as to any locality or as to any plant of any Employer, existing traffic conditions render it desirable to start the day shift at an earlier hour, such starting time may, with agreement of the Employer affected and the local Metal Trades Council, be made earlier, but in no event earlier than seven (7) A. M. Overtime at the rate of one and one-half times the established hourly rate shall be paid for all work performed in excess of eight (8) hours per day and forty (40) hours per week. Since this agreement is based on the intent of six-day-per-week operation, all work performed on Saturdays shall be paid for at one and one-half times the established hourly rate. Overtime at double the established rate shall be paid for all work performed on Sundays and holidays. These provisions relative to overtime payment and for Saturday work shall be effective only during the period of the National Emergency; provided, however, that this establishment of this emergency rate shall not be used as a subterfuge to defeat the double-time provisions for Saturday work which would be in effect were it not for the National Emergency.

The provision for time and one-half for overtime and on Saturdays established for the duration of the National Emergency shall automatically terminate whenever the President of the United States shall proclaim that such National Emergency no longer exists; thereafter, all overtime shall be computed on a double-time basis.

Holidays shall be as recognized by local Metal Trades Councils. When a recognized holiday falls on Sunday, the day observed by the Council shall be considered as a holiday and paid for as such.

5. Shift Work

Shift work will be permitted in all classifications without restriction on the following basis:

(a) The regular starting time of the day shift shall be eight (8) A. M., except that where, as to any locality or as to any plant of any Employer, existing traffic conditions render it desirable to start the day shift at an earlier hour, such starting time may, with the agreement of the Employer affected and the local Metal Trades Council, be made earlier, but in no event earlier than seven (7) A. M.

(b) The regularly established starting time of the day shift shall be recognized as the beginning of the twenty-four (24) hour work day period. When irregular or broken shifts are worked, overtime rates shall apply before the regular starting time and after the regular quitting time of the shift on which the Employee is regularly employed.

(c) First or regular daylight shift: An eight and a half ($8\frac{1}{2}$) hour period less thirty minutes for meals on the employee's time. Pay for a full shift shall be a sum equivalent to eight (8) times the regular hourly rate with no premium.

Second shift: An eight (8) hour period less thirty minutes for meals on employee's time. Pay for a full second shift period shall be a sum equivalent to eight (8) times the regular hourly rate plus ten per cent (10%).

Third shift: A seven and one-half ($7\frac{1}{2}$) hour period less thirty minutes for meals on employee's time. Pay for a full third shift period shall be a sum equivalent to eight (8) times the regular hourly rate plus fifteen per cent (15%).

(d) For work on any shift less than the full shift period, pay shall be the corresponding proportionate part of the pay for the full shift period, provided such amount be not less than the minimum pay prescribed in Paragraph 10 hereof.



No. 11794

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JOSHUA HENDY CORPORATION, a corporation,

Appellant,

vs.

LOUISE E. MILLS, Administratrix of the Estate of
Thomas C. Mills, Deceased,

Appellee.

REPLY BRIEF OF APPELLANT AND
CROSS-APPELLEE.

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I.

Introduction.

Cross-Appellant contends that the District Court should have awarded liquidated damages and a greater amount in attorney's fees. It appears, however, that the principal questions involved have been raised by the appeal; that is, whether the production of ships for war purposes was the production of goods for commerce, and whether Section 2 of the Portal Act removed jurisdiction from the District Court to make any award in this case under the Fair Labor Standards Act. Appellee has also raised the question as to whether the provisions of the Portal-to-Portal Act are constitutional. Appellant's Opening

Brief sufficiently covers the Appellant's position that the production of ships was for military and Naval use and not for commerce. The Court's attention will, therefore, be directed to the application of Section 2 of the Portal-to-Portal Act and the argument in support of the constitutionality thereof.

II.

The Application of Section 2 of the Portal-to-Portal Act.

Appellee concedes that there was no express provision of contract which made the employee's activities compensable during the period of the shift for which the claim was made, but argues that Section 2 is (1) limited to nonproductive employment, such as walking time; and (2) that it will be implied that productive time is compensable at all times. Appellee then places reliance upon a Union agreement, a portion of which is attached as an appendix to the Appellee's brief. This agreement contains no express provision making the claimed activities compensable. On the contrary, it provides that a working shift shall be for a certain period "less thirty minutes for meals on the employee's time." The employee ate lunch during his regular shift and in addition thereto had coffee from time to time. It thus clearly appears that the provisions of the collective bargaining contract expressly disallow the time claimed and nullify any implication that such time was considered as compensable time.

We repeat that Section 2 makes no distinction between productive and nonproductive work or different types of activities. (See pages 11 and 14 of Appellant's Opening Brief—quoting from the Congressional Record.) Under Section 2 in order to determine whether liability exists,

we look only to see whether there was an express provision of contract to pay for an activity no matter what kind of activity it may have been. Appellee relies upon District Judge Duncan's opinion in *Conwell v. Central Missouri Telephone Co.*, 74 Fed. Supp. 542, which is clearly based upon the erroneous premise that the Portal-to-Portal Act was not intended to cover any productive activities but only for traveling and waiting time. There is nothing in the language of Section 2 to support any such premise. As pointed out in our Opening Brief, it was made clear in the Congressional debates that Section 2 of the Act eliminated a great many more claims than those of the type considered in the so-called Portal-to-Portal cases; as stated particularly by Senator Lucas:

"In other words, any and all claims, over, above and beyond anything that has happened in these Portal-to-Portal suits, are also wiped out or outlawed, so to speak." (93 Cong. Rec. p. 2194.)

The case of *Frank v. Wilson & Co., Inc.*, cited by Appellee on page 14 of Appellee's brief involves an entirely different situation, since in that case the time in dispute had been determined by an arbitration award to be compensable under the Union contract.

Appellee also relies upon the case of *Devine v. Joshua Hendy Corporation*, cited in Appellee's brief at page 15. Appellee fails, however, to point out that in his oral statement at the conclusion of the trial Judge Leon R. Yankwich expressed the opinion that none of the plaintiffs was entitled to any award for activities during the lunch period, inasmuch as the Union contract expressly provided that there should be thirty minutes for meals on the employee's own time.

In the case of *Boerkoel v. Hayes Mfg. Corp.* (U. S. D. C., N. W. Dist., Mich., Mar. 26, 1948, not yet officially reported), 14 C. C. H. Labor Cases, par. 64,415, the contention was made that the activities were productive activities and that, therefore, it was not necessary to plead that they were compensable by an express contract provision. The court, however, applied the clear language of Section 2 and required the plaintiff to amend his complaint.

This position is not only supported by the clear and unambiguous language of Section 2, but is also supported by the Congressional history of the Act, as set forth in our Opening Brief. It follows that the District Court lacked jurisdiction since the activities were not expressly made compensable for the time claimed, and since, on the contrary, were expressly made noncompensable by the Union contract.

III.

Section 2 of the Portal-to-Portal Act Is Constitutional.

The rights given by the Fair Labor Standards Act are statutory, and not vested rights, and Congress has the power to take such rights away. *National Carloading Corp. v. Phoenix-El Paso Express, Inc.*, 174 S. W. (2d) 564; certiorari denied May 22, 1944, 322 U. S. 747. Furthermore, Congress has the constitutional power to abrogate private rights to remove burdens on commerce and provide for the national defense. *Louisville and Nashville Railroad Co. v. Motley* (1911), 219 U. S. 467; *Norman v. Baltimore Ohio R. R. Co.* (1935), 294 U. S. 239; *Fleming v. Rhodes* (1947), 331 U. S. 100.

To our knowledge, all the Federal District Courts which have considered the constitutionality of the Act have upheld its validity. See *Werner v. Milwaukee Solvay Coke Co.* (Wis. Sup. Ct., Mar. 29, 1948), 14 C. C. H. Labor Cases, par. 64,433. The Sixth Circuit Court of Appeals has also upheld its constitutionality; *Rogers Cartage Co. v. Reynolds* (Feb. 16, 1948), 14 C. C. H. Labor Cases, par. 64,317. In this case, the court stated:

“Congress, in the exercise of its power to regulate interstate commerce, may interfere with valuable property rights. *North American Co. v. Securities & Exchange Comm.*, 327 U. S. 686, 708; *American Power & Light Co. v. Securities & Exchange Comm.*, 329 U. S. 90. While the rights given to employees under the Fair Labor Standards Act are substantial, they did not exist at common law, nor were they established by the United States Constitution. Since they are purely the creature of statute, they may be altered or abolished by the Congress which established them at any time before they have ripened into final judgment. Cf. *Western Union Telegraph Co. v. Louisville & Nashville R. R. Co.*, 258 U. S. 13; *Kline v. Burke*, 260 U. S. 226, 234. The constitutionality of the Act has been recently considered in the various District Courts, and invariably upheld.”

We respectfully submit that Section 2 of the Portal-to-Portal Act is clearly constitutional and its retroactive application is a valid exercise of the Congressional power to regulate commerce.

IV.

Cross-Appeal.

A. CROSS-APPELLANT IS NOT ENTITLED TO LIQUIDATED DAMAGES.

Since the District Court had no jurisdiction to award any judgment in this action, it clearly follows that it had no right to award any liquidated damages. However, apart from the jurisdictional question, it clearly appears from the evidence that the thirty minutes during the shift for which the employee was not paid was omitted by the employer in good faith, since it was in accordance with the Union contract between the employer and the employees' Collective Bargaining Agent. It further appears that Union representatives were constantly in the yard and raised no question concerning the compensability of such time. Furthermore, wage payments made to the men were supervised by officials of the Maritime Commission who were at all times in the yard. The work being performed was on a cost-plus-a-fixed-fee contract, so that the employer had no motive to pay its employees other than what they were fully entitled to under the law. For the foregoing reasons, it is respectfully submitted that the Cross-Appellant is entitled to no liquidated damages.

B. ATTORNEY'S FEES SHOULD NOT HAVE BEEN AWARDED IN ANY AMOUNT.

As heretofore pointed out, the District Court did not have any jurisdiction to award a judgment for the plaintiff in this case. It therefore follows that the award of attorney's fees was not proper. If we assume that the Court did have such jurisdiction, however, the determina-

tion of attorney's fees is within the sound discretion of the trial judge. The amount awarded should not be increased except in cases of gross abuse of discretion.

V.

Conclusion.

The claim is barred by Section 2 of the Portal Act. There is no evidence and there are no findings to support the jurisdiction of the District Court under said Act. The Portal Act is clearly constitutional. It is respectfully submitted that the judgment should be reversed.

Dated at Los Angeles, California, April 29, 1948.

Respectfully submitted,

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No. 11794

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

JOSHUA HENDY CORPORATION, A CORPORATION, APPELLANT

v.

**LOUISE E. MILLS, ADMINISTRATRIX OF THE ESTATE OF THOMAS
C. MILLS, DECEASED, APPELLEE**

(and reverse title)

*APPEAL AND CROSS-APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA,
CENTRAL DIVISION*

**BRIEF FOR THE ADMINISTRATOR OF THE WAGE AND HOUR
DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS
AMICUS CURIAE**

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FILED

JUN 14 1940

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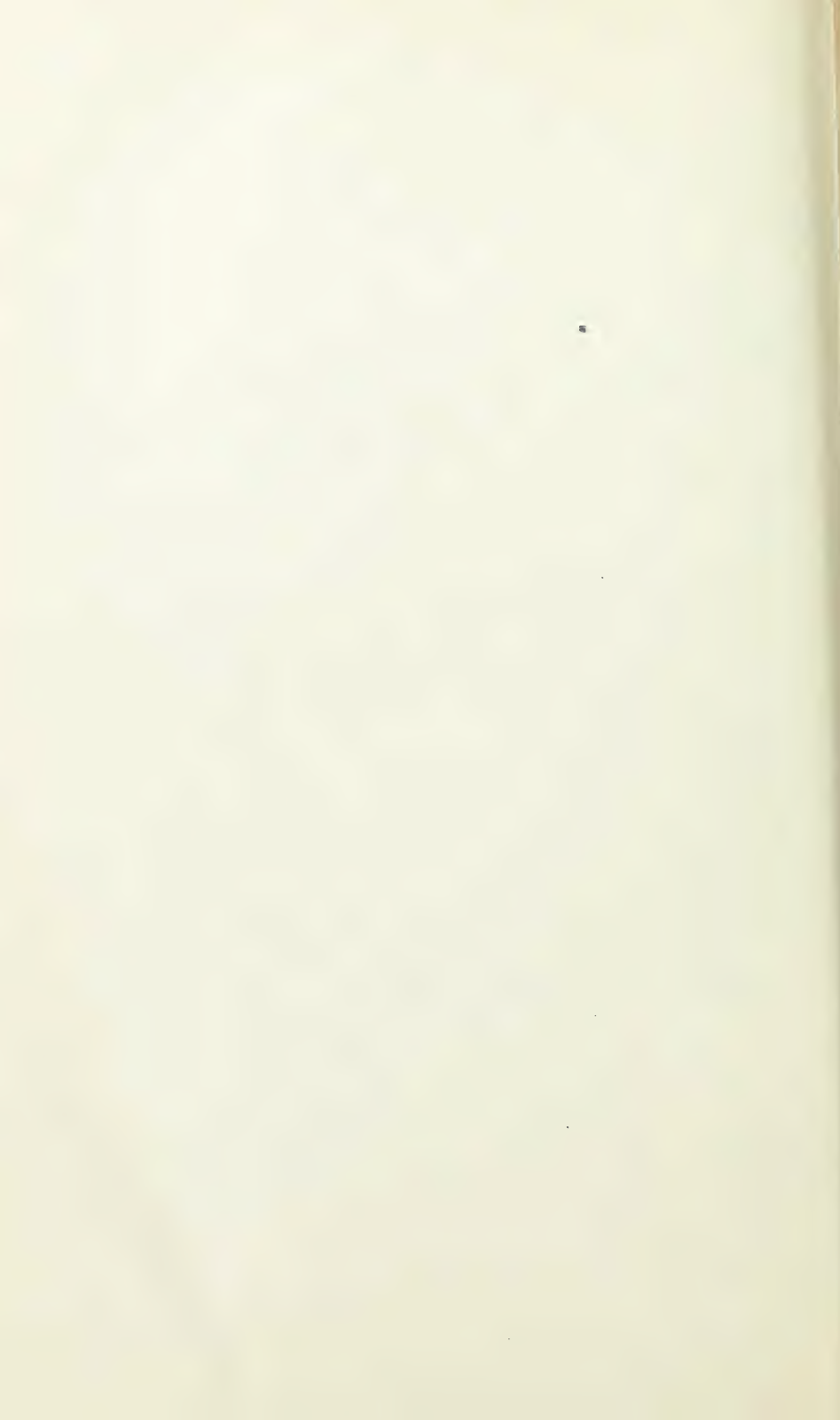
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(I)



In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11794

JOSHUA HENDY CORPORATION, A CORPORATION, APPELLANT

v.

LOUISE E. MILLS, ADMINISTRATRIX OF THE ESTATE OF THOMAS
C. MILLS, DECEASED, APPELLEE

(and reverse title)

*APPEAL AND CROSS-APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA,
CENTRAL DIVISION*

**BRIEF FOR THE ADMINISTRATOR OF THE WAGE AND HOUR
DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS
AMICUS CURIAE**

The Administrator of the Wage and Hour Division, United States Department of Labor, is charged with the duty and responsibility of administering the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C., 201 et seq. Because this case presents significant questions of interpretation of that Act, the Administrator, by leave of Court, submits this brief as amicus curiae.

STATEMENT

This is an appeal and cross-appeal from a final judgment of the District Court of the United States for the Southern District of California, Central Division, awarding plaintiffs, after trial, the sum of \$645.19 as unpaid overtime wages together with the sum of \$75.00 as attorney's fees pursuant to Section 16 (b) of the Fair Labor Standards Act. No liquidated damages were awarded, apparently on the basis of Section 11 of

the Portal-to-Portal Act of 1947, 61 Stat. 84, 29 U. S. C. 251, 261. This Court has jurisdiction over this appeal under Section 128 of the Judicial Code (28 U. S. C., sec. 225).

STATEMENT OF THE CASE

The appellant corporation was engaged in the production and repair of ships at Wilmington, California, pursuant to contract with the United States Maritime Commission (R. 7, 21, 61). Apparently most of the ships were cargo vessels; some troop transports were also constructed (R. 112, 136). The yard was owned by the Maritime Commission and leased to appellant (R. 110, 106). Title to all materials and equipment used in the construction of the ships was in the Commission (R. 110, 161-162). Upon completion each ship was delivered by appellant to the Commission at the yard and subsequently sent to points outside the State of California (R. 7, 21). The troop transports were turned over to the Navy by the Commission (R. 114).

The contracts between appellant and the Commission were on a cost-plus basis up to March 1, 1945, but commencing with that date they were of the lump-sum type (R. 104, 154). The sample contract in the record (R. 103, 135-177) is a cost-plus contract. It was entered into pursuant to Public Law 247 (77th Congress), approved August 25, 1941, 55 Stat. 669, 681, which authorized the construction of "merchant vessels of such type, size and speed as it [the Commission] may determine to be useful for carrying on the commerce of the United States and suitable for the conversion into naval or military auxiliaries" (R. 135). The contract recites the Commission's determination to that effect (R. 135).

Appellant hired its employees with no assistance from the Commission (R. 106), and on only "one or two occasions" did appellant discharge employees at the request of the Commission (R. 100). As an officer of appellant testified: "After all, we were supposed to be running the place" (R. 100). "He [the representative of the Commission] couldn't tell us how to manage it or else there would have been no point in paying us a fee if they are going to tell us how to do it" (R. 108). Under the contract the Commission had access to the premises (R.

158), and all material and workmanship was subject to inspection by the Commission at "proper times" (R. 160). The contract prohibited the making of changes in the general dimensions and characteristics of any of the vessels without the appellant's written consent (R. 139). Upon default by appellant, the Commission was authorized to terminate the contract, enter upon the site, and "take possession" thereof as well as of any vessels and any machinery, materials, equipment, plans and specifications required for the construction of the vessels (R. 170-172).

Appellant admits it employed the deceased in work necessary to the production of the vessels but denies that they were "goods" produced for "commerce" within the meaning of the Fair Labor Standards Act (R. 16). The court below rejected appellant's contentions.¹

ARGUMENT

The Administrator's position regarding the general question of the applicability of the Act to the production of war materials by cost-plus contractors with the Government is set forth in detail in the brief filed in the Supreme Court by the Solicitor General in *Kennedy v. Silas Mason Co.*, October Term, 1947, No. 590, decided May 17, 1948. Acceptance of the arguments advanced in that brief would require affirmance of the decision of the court below that the employee here involved was within the coverage of the Act. We are therefore filing six copies of that brief with the Clerk and respectfully request the Court to treat the copies thus filed as an appendix to this brief.²

In the instant case there are additional reasons, beyond those stated in the brief of the United States in the *Silas Mason* case, for holding that the employee was within the scope of the Act. In this brief, without rearguing the propositions advanced in

¹ The district court also held inapplicable a defense raised under Section 2 of the Portal-to-Portal Act of 1947 (61 Stat. 84, 29 U. S. C. 252). Since the Administrator's interest is confined to the future enforcement of the Fair Labor Standards Act, and since the applicability of Section 2 of the Portal-to-Portal Act is limited to activities performed prior to May 14, 1947, this brief does not deal with the question.

² Copies of that brief are being furnished to counsel for the respective parties on this appeal.

the brief in the *Silas Mason* case, we shall set forth the additional considerations which point to coverage here.

The Supreme Court in the *Silas Mason* case declined to pass upon the merits of that case but instead vacated the judgment of the courts below and remanded the case for amplification of the record. We are of the opinion that a similar disposition of this case is not required nor appropriate, since neither of the matters as to which the Supreme Court requested amplification is at issue here. One of these issues was whether the plaintiff and defendant in the *Silas Mason* case stood in the relationship of employee and employer under the Act. The existence of that relationship is conceded here (R. 5-8, 179-180). The other issue was the effect upon the *Silas Mason* case of the Act of July 2, 1940, 54 Stat. 712, pursuant to which the contract in that case was let. Because certain sections of that Act pertained to overtime compensation, it was argued to the Supreme Court that the Act of July 2, 1940, precluded operation of the Fair Labor Standards Act. In the instant case, however, the contract between appellant and the Government recites that it was entered into pursuant to "Public Law 247 (77th Congress) approved August 25, 1941," 55 Stat. 669, 681 (R. 135). This statute relates solely to appropriations for the Maritime Commission and other agencies of the Government, and does not purport in any way to affect overtime compensation. There is therefore no room for argument here that the operation of the Fair Labor Standards Act is precluded by the legislation under which the contract was let. For those reasons, we believe this Court may proceed to decide the issues in this case upon the record here presented.³

I

The ships were produced for "commerce" within the meaning of the Fair Labor Standards Act

The district court's holding that the cargo vessels and troop transports in the instant case were produced for "commerce" within the meaning of the Fair Labor Standards Act is plainly correct under this Court's decision in *Ritch v. Puget Sound*

³ It should also be noted that the *Silas Mason* case arose on summary judgment, not, as in the instant case, after a full trial.

Bridge & Dredging Co., 156 F. (2d) 334. In that case this Court held that combat vessels owned and operated by the United States Navy were instrumentalities of commerce, so that employees engaged in construction work in a Navy Yard were engaged "in commerce" within the coverage of the Act. The decision in the *Ritch* case applies *a fortiori* to the instant case which deals with noncombat vessels (cargo ships and troop transports), the production of which was specifically authorized "for carrying on the commerce of the United States" (R. 135). This has been recognized even by the courts which have held that work on combat vessels is not production of goods for commerce. Thus in *Divins v. Hazeltine Electronics Corp.*, 163 F. (2d) 100 (C. C. A. 2), the court, although declining to apply the ruling of the *Ritch* decision to combat vessels, held that armed cargo transports and armed transports should be regarded as "engaged in commerce, even though the goods or persons they transport will be devoted to the war effort after arrival at destination" (163 F. (2d) at 102). Similarly in *St. Johns River Shipbuilding Co. v. Adams*, 164 F. (2d) 1012, 1014 (decided by the Fifth Circuit Court of Appeals the same day that it decided the *Silas Mason* case), the court, although stating that tankers were not produced for commerce, expressly held that the production of "Liberty ships" for the Maritime Commission, pursuant to the same statutory authority as that authorizing the ship construction in the instant case, was the production of goods for commerce within the meaning of the Act.

Under the holdings of the *Ritch*, *Divins*, and *Adams* cases, as well as for the reasons stated at pages 23-37 of the brief filed by the United States in the *Silas Mason* case, *supra*, we submit that the court below was correct in holding that the ships were produced for "commerce" within the meaning of the Act.⁴

⁴ Appellant's reliance on *Northern Pacific R. Co. v. United States*, 330 U. S. 248 (appellant's br., pp. 7-8) is plainly misplaced. In holding that certain articles, including bowling alleys, were "military or naval property of the United States moving for military or naval and not for civil use" so as to be entitled to land-grant rates under Section 321 (a) of the Transportation Act of 1940, a statute which on its face is a regulation of interstate commerce, the Supreme Court obviously did not hold that transportation for "military or naval" use was not transportation in commerce. It held quite the opposite.

II

The ships were "goods" within the meaning of the Fair Labor Standards Act

Section 3 (i) of the Act defines "goods" as meaning all commodities, "including ships," except "goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer or processor thereof." Appellant argues (appellant's br., pp. 8-9) that this exclusionary clause removes the ships it produced from the category of "goods." The argument, however, appears to rest wholly on the fact that the United States, rather than appellant, at all times owned the materials, parts and supplies which went into the production of the ships. The terms of the contract between appellant and the United States make it clear that only title, and not "actual physical possession," was retained by the United States during the performance of the contract. Thus the contract provides that the Commission and its authorized representatives "shall at all times have access to the premises" (R. 158), and that all materials and workmanship "shall be subject to inspection by inspectors of the Commission at any and all proper times" (R. 160); it further provides that upon default by appellant, the Commission could terminate the contract, "enter upon the site * * * and take possession" of all vessels and all machinery, materials, equipment, plans and specifications required for the construction of the vessels (R. 170-172)—provisions irreconcilable with a contention that the Government retained "actual physical possession" of the materials and goods during the performance of the contract. For these and the other reasons set forth at pages 37-52 of the brief of the United States in the *Silas Mason* case, *supra*, we submit that the ships were "goods" within the meaning of the Act.

Liberty ships produced under circumstances virtually identical to those present here were held by the Fifth Circuit Court of Appeals to constitute "goods." *St. Johns River Shipbuilding Co. v. Adams*, *supra*. Armed cargo ships and troop transports—the very types of ships produced in the instant case—were held by the Second Circuit Court of Appeals to constitute

“goods” while in the hands of contractors engaged in repairing them even though the ships had already been in the actual physical possession of the United States. *Divins v. Hazeltine Electronics Corp., supra.* No appellate court has asserted a contrary view.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the court below was correct in holding that deceased was employed by appellant in the production of goods for commerce.

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JUNE 1948.

No. 11,794

United States
Circuit Court of Appeals
For the Ninth Circuit

JOSHUA HENDY CORPORATION, a corporation,

Appellant,

vs.

LOUISE E. MILLS, Administratrix of the
Estate of Thomas C. Mills, deceased,

Appellee.

Brief of the Waterfront Employers
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No. 11,794

United States
Circuit Court of Appeals
For the Ninth Circuit

JOSHUA HENDY CORPORATION, a corporation,

Appellant,

vs.

LOUISE E. MILLS, Administratrix of the
Estate of Thomas C. Mills, deceased,

Appellee.

**Brief of the Waterfront Employers
Association of the Pacific Coast
and the
San Francisco Employers' Council
as Amici Curiae**

SCOPE OF THIS BRIEF

This brief is filed pursuant to leave of Court for the exclusive purpose of discussing the constitutionality, as applied to a claim arising prior to its enactment, of Section 2 of the Portal-to-Portal Act, which provides in substance that no employer shall be subject to any liability under the Fair Labor Standards Act on account of any

activity of an employee, excepting activities which were compensable by contract or custom. We do not propose to discuss the question whether the activities in which plaintiff engaged were of a kind which are compensable under the Act; we assume for the purpose of the argument that they were not, and that plaintiff is here asserting a claim to a windfall payment of which he had no expectation founded in either contract or custom at the time of performance of the services for which the payment is claimed. In short, the argument which follows assumes that the plaintiff's claim is one of the type upon which Section 2 of the Act, if constitutional, precludes recovery.

SUMMARY OF ARGUMENT

The Courts, without exception, have held Section 2 of the Act to be constitutional. The Act does not attempt to abridge common law or non-statutory rights, but is a declaration by Congress that it never intended to confer statutory rights such as here asserted. Congress can deprive the District Courts of jurisdiction to relief predicated upon such alleged statutory rights. It also can abrogate the alleged rights themselves, because a right founded solely in statute may be repealed by statute and because the Commerce Clause empowers Congress to abrogate private rights in the national interest.

ARGUMENT

I. The Courts Have Held Without Exception That Section 2 of the Act Is Constitutional.

Since the effective date of the Act (May 14, 1947) innumerable Portal-to-Portal actions based on claims arising prior thereto have been dismissed by reason of the provi-

sions of the Act. Cited in the margin are 60 such decisions from one Circuit Court of Appeals¹ and from 32 different United States District Courts.² In every one of

¹*Seese v. Bethlehem Steel Co.* (C.C.A. 4th) 14 L.C. 64,515, 7 W.H. Cases 989.

²*Alameda v. Paraffine Companies, Inc.* (N.D. Cal.) 13 L.C. 64, 158; *Cardinale v. General Motors Corp.* (S.D. Cal.) 76 F. Supp. 742; *Devine v. Joshua Hendy Corp.* (S.D. Cal.) 14 L.C. 64,496; *Felton v. Latchford Marble Glass Co.* (S.D. Cal.) 14 L.C. 64,548; *Kirkham v. Pacific Gas & Electric Co.* (N.D. Cal.) 13 L.C. 64,199; *Quinn v. California Shipbuilding Corp.* (S.D. Cal.) 76 F. Supp. 742; *Local 626 UAW v. General Motors Corp.* (D.C. Conn.) 76 F. Supp. 593; *Moeller v. Atlas Powder Co.* (D.C. Conn.) 7 W.H. Cases 395; *May v. General Motors Corp.* (N.D. Ga.) 73 F. Supp. 878; *Hollingsworth v. Federal Mining & Smelting Co.* (D.C. Idaho) 74 F. Supp. 1009; *Bauler v. Pressed Steel Car Co., Inc.* (N.D. Ill.) 14 L.C. 64,569; *Smith v. American Can Co.* (E.D. Ill.) 8 F.R.D. 112; *Hornbeck v. Dain Mfg. Co.* (S.D. Ia.) 7 F.R.D. 605; *Elting v. North American Aviation Inc. of Kansas* (D.C. Kan.) 13 L.C. 64,154; *Moeller v. Eastern Gas & Fuel Associates* (D.C. Mass.) 74 F. Supp. 937; *Sherman v. Bethlehem Steel Co.* (D.C. Mass.) 14 L.C. 64,524; *Bateman v. Ford Motor Co.* (E.D. Mich.) 76 F. Supp. 179; *Boerkoel v. Hayes Mfg. Corp.* (W.D. Mich.) 14 L.C. 64,414; *De Maio v. Grant Storage Battery Co.* (D.C. Minn.) 14 L.C. 64,285; *Plummer v. Minneapolis-Moline Power Implement Co.* (D.C. Minn.) 76 F. Supp. 745; *Bumpus v. Remington Arms Co.* (W.D. Mo.) 74 F. Supp. 788; *Hays v. Hercules Powder Co.* (W.D. Mo.) 7 F.R.D. 599; *Horner v. McQuay Norris Mfg. Co.* (E.D. Mo.) 13 L.C. 64,087; *Johnson v. Park City Consol. Mines Co.* (E.D. Mo.) 73 F. Supp. 852; *Lockwood v. Hercules Powder Co.* (W.D. Mo.) 14 L.C. 64, 366; *Sadler v. W. S. Dickey Clay Mfg. Co.* (W.D. Mo.) 73 F. Supp. 690; *Tucker v. Pratt & Whitney Aircraft Corp.* (W.D. Mo.) 7 W.H. Cases 839; *Role v. J. Neils Lumber Co.* (D.C. Mont.) 74 F. Supp. 812; *McComb v. Swanson & Sons* (D.C. Neb.) 14 L.C. 64,541; *Grazeski v. Federal Shipbuilding & Dry Dock Co.* (D.C. N.J.) 14 L.C. 64,468; *Abernathy v. General Motors Corp.* (S.D. N.Y.) 14 L.C. 64,525; *Bartels v. Sperti, Inc.* (S.D. N.Y.) 73 F. Supp. 751; *Bonner v. Elizabeth Arden, Inc.* (S.D. N.Y.) 13 L.C. 64,147; *Borucki v. Continental Baking Co.* (S.D. N.Y.) 74 F. Supp. 815; *Darr et al. v. Mutual Life Ins. Co. of New York* (S.D. N.Y.) 72 F. Supp. 752; *Donovan v. Republic Steel Corp.* (W.D. N.Y.) 14 L.C. 64,295; *Holland v. General Motors Corp.* (W.D. N.Y.) 75 F. Supp. 274; *Lemme v. Caruso Foods, Inc.* (S.D. N.Y.) 14 L.C. 64,391; *Markert v. Swift & Co.* (S.D. N.Y.) 13 L.C. 64,146; *Mauro v. Slaughter & Co.* (S.D. N.Y.) 14 L.C. 64,299; *Murphy v. Ford Motor Co.* (N.D. N.Y.) 14 L.C. 64,538; *Shaiervitz v. Laks* (S.D. N.Y.) 14 L.C. 64,509;

these cases the constitutionality of Section 2 of the Act has been sustained. Furthermore, this Court itself has passed upon the same constitutional question in upholding Section 11 of the Act,³ as have also the courts of the Sixth and Eighth Circuits, in upholding Sections 9 and 11.⁴

We have found no case in which Section 2 has been held unconstitutional.

II. The Act Does Not Involve an Attempt by Congress to Abridge Common Law or Non-Statutory Rights; It Is a Declaration by Congress That Congress Never Intended to Confer a Statutory Right Such as Here Asserted.

Reference to the background against which the Portal-to-Portal Act was enacted, and to the nature of the claims at which it was directed, is necessary to place the arguments regarding constitutionality in their proper setting.

Sinclair v. United States Gypsum Co. (W.D. N.Y.) 75 F. Supp. 439; *Sochulak v. American Brake Shoe Co.* (S.D. N.Y.) 7 W.H. Cases 584; *Fajack v. Cleveland Graphite Bronze Co.* (N.D. Ohio) 73 F. Supp. 308; *Hassel v. Standard Oil Co.* (N.D. Ohio) 8 WH Cases 41; *Smith v. Cleveland Pneumatic Tool Co.* (N.D. Ohio) 14 L.C. 64,462; *Adkins v. E. I. duPont de Nemours & Co.* (N.D. Okla.) 13 L.C. 64,025; *McDaniel v. Brown & Root, Inc.* (E.D. Okla.) 14 L.C. 64,511; *Boehle v. Electro Metallurgical Co.* (D.C. Ore.) 72 F. Supp. 21; *Battery Workers Union v. Electric Storage Battery Co.* (E.D. Penn.) 14 L.C. 64,298; *Hart v. Aluminum Co. of America* (W.D. Pa.) 73 F. Supp. 727; *Lasater v. Hercules Powder Co.* (E.D. Tenn.) 73 F. Supp. 264; *Burfeind v. Eagle-Picher Co.* (N.D. Tex.) 71 F. Supp. 929; *Story et al. v. Todd Houston Shipbuilding Corp.* (S.D. Tex.) 72 F. Supp. 690; *Cochran et al. v. St. Paul & Tacoma Lumber Co.* (W.D. Wash.) 73 F. Supp. 288; *Miller v. Howe Sound Min. Co.* (E.D. Wash.) 77 F. Supp. 541; *Ackerman v. J. I. Case Co.* (E.D. Wis.) 74 F. Supp. 639.

³*Southern California Freight Lines v. Davis*, 167 F.2d 708.

⁴*Rogers Cartage Co. v. Reynolds* (C.C.A. 6th) 166 F.2d 317; *Day & Zimmermann, Inc. v. Reid* (C.C.A. 8th) 14 L.C. 64,545, 7 W.H. Cases 1040.

As already stated, we assume the present case to be a "portal-to-portal" case, i.e., a suit to recover compensation for alleged services which the parties did not consider to be compensable "work" at the time of their performance. This being its nature, the suit is based on a construction of the *Fair Labor Standards Act* by the Supreme Court in the *Mt. Clemens Pottery* case that came as a surprise to the country.

That decision held that certain time must be compensated, solely because of a judicial construction of the meaning of the term "work" and "*regardless of contrary custom or contract*" (328 U.S. at 692). This construction met with violent disagreement from a large segment of the Supreme Court itself. Mr. Justice Burton and Mr. Justice Frankfurter dissented (cf. 328 U.S. at p. 697); Mr. Justice Jackson was in Nuernberg at the time but after his return took occasion, in *Walling v. Portland Terminal Co.*, 330 U.S. 148, 154, to express his complete disapproval of the *Mt. Clemens* doctrine.

The effect of the *Mt. Clemens* decision was monstrous and electrifying. After long deliberation Congress enacted the *Portal-to-Portal Act* to establish as law what, according to the three dissenting judges, always had been the law and what Congress itself believed always had been the law.

The *Portal-to-Portal Act* prohibits any recoveries except for activities which were compensable as work by (1) *express contract* or (2) *custom*. And Congress expressly made this rule applicable to suits already instituted as well as future actions. It did so because it felt that the *Mt. Clemens* decision was a perversion of the legislative intent.

The effect of the *M. Clemens* decision and the conclusions of Congress concerning the needs of the public welfare in the shocking situation then confronting the country are clearly stated in Section 1 of the *Portal-to-Portal Act*. There Congress states its policy and its findings. As Mr. Justice Holmes said in *Block v. Hirsch*, 256 U.S. 135 at 154, such findings by Congress declared in its statutes are entitled to the highest respect of the courts. What is more, to borrow the language¹ of Mr. Justice Holmes in *Block v. Hirsch*, Congress was here but stating "a publicly notorious * * * fact."

We quote these findings (Title 29 U.S.C., Sec. 251):

"SEC. 251. CONGRESSIONAL FINDINGS AND DECLARATION OF POLICY.

"(a) The Congress finds that the Fair Labor Standards Act of 1938, as amended, *has been interpreted judicially in disregard of long-established customs, practices, and contracts* between employers and employees, thereby *creating wholly unexpected liabilities, immense in amount and retroactive in operation*, upon employers with the results that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand, (1) the payment of such liabilities would bring about *financial ruin* of many employers and seriously impair the capital resources of many others, thereby resulting in the *reduction of industrial operations*, halting of expansion and development, *curtailing employment, and the earning power of employees*; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross in-

equality of competitive conditions between employers and between industries; (4) *employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay*; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in; (6) voluntary collective bargaining would be interfered with and industrial disputes between employees and employers and between employees and employees would be created; (7) *the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged*; (8) the Public Treasury would be deprived of large sums of revenues and public finances would be seriously deranged by claims against the Public Treasury for refunds of taxes already paid; (9) the cost to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increased cost of war contracts; and (10) serious and adverse effects upon the revenues of Federal, State, and local governments would occur.

“The Congress further finds that all of the foregoing constitutes a substantial burden on commerce and a substantial obstruction to the free flow of goods in commerce.

“The Congress, therefore, further finds and declares that it is in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this Act be enacted. * * *

“(b) It is declared to be the policy of the Congress in order to meet the existing emergency *and to correct existing evils* (1) to relieve and protect interstate commerce from practices which burden and obstruct it; (2) to protect the right of collective bargaining; and (3) to define and limit the jurisdiction of the courts.”

The decision of the Supreme Court in the *Mt. Clemens* case *retroactively* created liabilities running into billions. By a new decision, repudiating *Mt. Clemens*, it could end all such claims, just as it created them. Yet plaintiff makes the monstrous contention that Congress is helpless to withdraw from the courts created by it jurisdiction to enforce these retroactively created liabilities and that the nation must, in the language of Mr. Justice Jackson, lie in a legal strait jacket of the Court's own design, from which there could be no possible escape.

The *Portal-to-Portal Act* does not involve an attempt by Congress to abridge common law or non-statutory rights. It is a declaration by Congress that it did not intend to confer certain statutory rights, that if, under judicial construction, a statute of Congress conferred such rights, then that which Congress had by statute created it by statute would revoke.

In the face of the notorious facts recited in Section 1 of the Act, plaintiff cannot rationally talk in terms of vested rights or impairment of contracts. No consensual element is involved in the plaintiff's claim. He seeks to realize a pure windfall.

The *Portal-to-Portal Act* seeks to prevent the realization of such a windfall in two ways: (1) it divests the

District Courts of jurisdiction to proceed; (2) it abrogates the right of plaintiff to recover on the merits. The Act contains the usual separability clause, and, if either of these provisions is constitutional, the action must fail. In fact, the Act is constitutional in both respects.

III. The Act Operates Constitutionally to Deprive the District Courts of Jurisdiction.

The constitutionality of the provisions depriving the District Courts of jurisdiction is so clear that many courts have rested their dismissals on those provisions alone. See e.g., *Alameda v. The Paraffine Companies* (N.D. Cal.), 13 L.C. 64,158; *Johnson v. Park City Consolidated Mines Co.* (E.D. Mo.), 73 F. Supp. 852; *Quinn v. California Shipbuilding Corp.* (S.D. Cal.), 7 W.H. 310.

IV. The Act Operates Constitutionally to Deprive the Plaintiff of His Claim for Relief.

The provisions of the Act terminating pending cases on the merits are likewise constitutional.

Plaintiff's argument is, in essence, that the Act is unconstitutional because it has a retroactive effect,—a sardonic condemnation of an act the very purpose of which is to eliminate the baneful retroactive effect of the *Mt. Clemens* decision.

As the courts have repeatedly said, a statute is not unconstitutional merely because it has a retroactive operation. E.g., *United States v. Pownall*, 65 F. Supp. 147, 150 ("The Constitution of the United States does not forbid making a federal civil statute operate retroactively."—Yankwich, J.); *Blount v. Windley*, 95 U.S. 173,

180 (“* * * there is no constitution inhibition against retrospective laws. Though generally distrusted, they are often beneficial, and sometimes necessary”).

Plaintiff refers to his claim as “vested” and contends that the Act violates the due process clause of the Fifth Amendment. But to term his claim “vested” merely begs the question. A vested right is one “of which the individual cannot be deprived arbitrarily without injustice.” *American States etc. Co. v. Johnson*, 31 C.A. 2d 606, 614; *Nebbia v. New York*, 291 U.S. 502. The cancellation of a windfall is not an arbitrary deprivation that operates unjustly. As said in *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 at p. 316, when no course of action has been undertaken on the assumption that a certain rule of law exists, cancellation of that rule is not a deprivation of property without due process. In *United States v. Heinszen & Co.*, 206 U.S. 370, before ratification of the treaty of peace with Spain tariff duties were imposed and collected on imports into the Philippines by order of the President of the United States. Thereafter the Supreme Court held that the President had no such power, and that those who had paid had the right to recover. Subsequently, Heinszen sued to recover certain payments. While the action was pending Congress passed legislation ratifying the tariff *ab initio*. The trial court gave judgment for plaintiffs, holding that the Act violated the Fifth Amendment. The Supreme Court reversed and held that it did not do so.

A. WHERE A RIGHT HAS BEEN CREATED SOLELY BY STATUTE, IT MAY BE REPEALED BY STATUTE IF NOT YET REDUCED TO JUDGMENT.

The fundamental vice of plaintiff's argument is that it ignores the fact that his right in this case to recover anything at all was *solely and purely* statutory, the creature of Congress.

It is a fundamental rule that, where a right is created solely by statute, the authority that enacted the statute may repeal it and may abridge the right as if it never existed, if not yet reduced to judgment. *Ex parte McCordle*, 74 U.S. 506. All the portal-to-portal decisions note this element.

Mr. Justice Henshaw's opinion in *People v. Bank of San Luis Obispo*, 159 Cal. 65, discusses the subject at length and completely supports the constitutionality of the *Portal-to-Portal Act*. *Moss v. Smith*, 171 Cal. 777 (opinion also by Judge Henshaw) lays down the same rule.

If the Fair Labor Standards Act—that is to say, the construction which the Supreme Court saw fit to place upon it after the alleged “services” had been performed—entered into and became part of plaintiff's contract of employment, *there also entered into the contract as one of its terms the power of Congress to repeal any statutory rights created by the Fair Labor Standards Act.*

In *Gelfert v. National City Bank*, 313 U.S. 221, the court said (p. 231):

“As this Court said in *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 435, ‘Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order.’ And see

Voeller v. Neilston Warehouse Co., 311 U.S. 531. It is that reserved legislative power with which we are here concerned.”

And cf. *United States v. Heinszen & Co.*, 206 U.S. 370 and *East New York Bank v. Hahn*, 326 U.S. 230.

In the *Gelfert* case, which related to state legislation, the power to repeal and change was found in the essential attributes of sovereign power. In the case of Congress, there is something more, for Title I *U.S.C.*, Sec. 29, provides that “the repeal of any statute shall not have the effect to release or extinguish any * * * liability incurred under such statute unless the repealing Act shall so expressly provide.” In other words, if it is so provided, the statutory liability shall be extinguished. The *Portal-to-Portal Act* does, of course, expressly provide that there shall be no liability even in pending actions. Now Section 29 has been on the statute books since long before the Fair Labor Standards Act. If the latter entered into contracts of employment as one of its terms, the provisions of Section 29 also entered into the contract and conferred on Congress the power to revoke any rights conferred by the Fair Labor Standards Act.

The foregoing rules are particularly applicable here. The rights conferred by the Fair Labor Standards Act on individuals were created not so much for the benefit of the individual as for the sake of the public. The very cases cited in plaintiff’s memorandum point to the double character of the right and emphasize its double aspect. See e.g., *Overnight Motor Co. v. Missel*, 316 U.S. 572, 576, 577. It is for this reason that the Supreme Court has held that employees cannot waive their rights or give re-

leases. *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 704, 709; *Schulte v. Gangi*, 328 U.S. 108.

The rule that upon repeal of a statute all rights not yet reduced to judgment fall without violation of any constitutional right is particularly applicable where the repealed right was created for the interest of the public. *Ewell v. Daggs*, 108 U.S. 143, 151. If, as said in the *O'Neil* case, *supra*, at p. 704, "Where a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate," then such a private right does not become constitutionally immune from revocation where its enforcement would thwart that legislative policy or one deemed paramount.

Plaintiff cites a number of cases, but those very cases are reviewed and held not to be in point in *Seese v. Bethlehem Steel Co.*, (C.C.A. 4th) 7 W.H. Cases 989, 14 L.C. 64,515, as well as in many other decisions cited by us. A consideration of one, *Coombes v. Getz*, 285 U.S. 434, suffices to answer all of them. That case involved directors' liability, created by the State Constitution, to creditors for money embezzled by corporate officers. While the action was pending the constitutional provision was repealed. The court held that the repeal could not affect the right of the creditors because the right was not *purely* statutory. The creditors had extended credit to the corporation in reliance on the constitutional provision and had incurred actual loss. The court distinguished other cases on the ground that in them "No element of contract was present." But such is the situation here,

for no element of contract was present. Here plaintiff did not suppose that what he now seeks compensation for was work or something for which compensation was due. Not until the *Mt. Clemens* case was that idea born in the fertile brain of legal counsel for one of the great unions. As stated in Section 1 of the *Portal-to-Portal Act* (29 U.S.C., Sec. 251), recoveries in portal-to-portal cases would constitute a sheer *windfall*. The present case falls within the reasoning of the Supreme Court in *Morely v. Lake Shore etc. Railway Co.*, 146 U.S. 162, where it was held that a judgment obtained before the passage of an act which reduced the rate of interest on judgments was not protected by the Constitution. The court said (p. 169):

“It is contended on behalf of the plaintiff in error, as stated above, that the judgment is itself a contract, and includes within the scope of its obligation the duty to pay interest thereon. As we have seen, it is doubtless the duty of the defendant to pay the interest that shall accrue on the judgment, if such interest be prescribed by statute, *but such duty is created by the statute, and not by the agreement of the parties*, and the judgment is not itself a contract within the meaning of the constitutional provision invoked by the plaintiff in error. *The most important elements of a contract are wanting. There is no aggregatio mentium. The defendant has not voluntarily assented or promised to pay.*”

We also note that in *Coombes v. Getz*, Judges Cardozo, Brandeis and Stone dissented on the ground that the “liability by the law of its creation was defeasible in its origin.” This is clearly true in the case of federal statutes in view of the existence of *Title I, U.S.C.*, Section 29.

B. APART FROM THE FACT THAT THE REPEALED RIGHTS WERE WHOLLY STATUTORY, THE ACT IS CONSTITUTIONAL AS A LEGITIMATE EXERCISE OF THE COMMERCE POWER.

The decision in the *gold clause* cases, *Norman v. Baltimore & Ohio Railroad Co.*, 294 U.S. 240, is a complete answer to plaintiff. It establishes (pp. 309, 310) “*the power of the Congress to invalidate the provisions of existing contracts which interfere with the exercise of its constitutional authority.*”

“The principle is not limited to the incidental effect of the exercise by the Congress of its constitutional authority. There is no constitutional ground for denying to the Congress the power expressly to prohibit and invalidate contracts although previously made, and valid when made, when they interfere with the carrying out of the policy it is free to adopt.”

The *Portal-to-Portal Act* was enacted in the exercise of the commerce power to protect interstate commerce from grave evils, and it so declares in the Congressional declaration of Findings and Policy which will be found in Section 1 (29 U.S.C., Sec. 251). Congress declared that there was an existing emergency, that it was necessary to relieve commerce from the obstruction and burdens then clogging it, and Congress concluded that “it is in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect and foster commerce, that this act be enacted.” The President of the United States expressed agreement with these Findings when he approved the statute.

The *Portal-to-Portal Act* was not designed to regulate this or that contract between private individuals but to

protect the public from what Congress thought would be calamity.

As said by the Circuit Court of Appeals for the Ninth Circuit in *P. G. & E. Company v. Sacramento Municipal Utility District*, 92 F.2d 365 at 370, in determining the constitutionality of a state or federal law the court must consider as existing every rationally conceivable state of facts which would justify the enactment of the law and which may be attributed to the deliberation, belief and purpose of the legislature in its enactment.

In *East New York Bank v. Hahn*, 326 U.S. 230, the court considered the power of the legislature to enact legislation which might frustrate and invalidate private contracts. It notes that such power had been upheld in numerous cases of recent years and it deduced (p. 232)

“this governing constitutional principle: when a widely diffused public interest has become enmeshed in a network of multitudinous private arrangements, the authority of the State ‘to safeguard the vital interests of its people,’ 290 *U.S.* at 434, is not to be gainsaid by abstracting one such arrangement from its public context and treating it as though it were an isolated private contract constitutionally immune from impairment.

“The formal mode of reasoning by means of which this ‘protective power of the State,’ 290 *U.S.* at 440, is acknowledged is of little moment. It may be treated as an implied condition of every contract and, as such, as much part of the contract as though it were written into it, whereby the State’s exercise of its power enforces, and does not impair, a contract.”

In the *gold clause* cases, the parties had in fact made contracts, which Congress constitutionally abrogated. Here

they made no contracts for the payment of portal-to-portal pay. Plaintiff merely argues that the previous statute became part of the contract of employment. Since Congress can constitutionally abrogate express contracts, it certainly may abrogate a so-called implied contract where the implication arises solely from the existence of a previous—but now repealed—statute of Congress.

When the Fair Labor Standards Act was passed, it was held to apply to employment contracts *theretofore existing*, over the objection that by increasing the agreed rate of payment it was impairing the obligation of the contract. The court said:

“If overtime pay may have this effect upon commerce, private contracts made before or after the passage of legislation regulating overtime cannot take the overtime transaction ‘from the reach of dominant constitutional power.’ *Norman v. B. & O. R. Co.*, 294 U.S. 240, 306-311. If, in the judgment of Congress, time and a half for overtime has a substantial effect on these conditions, it lies with Congress’ power to use it to promote the employees’ well-being.” *Overnight Motor Co. v. Missel*, 316 U.S. 572 at 577.

What was true of the very statute upon which plaintiff bases his rights is equally true of the statute which has put an end to them.

CONCLUSION

We respectfully submit that Section 2 of the *Portal-to-Portal Act* is constitutional.

Dated, San Francisco, California

July 12, 1948.

BROBECK, PHLEGER & HARRISON,
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PETITION FOR REHEARING.

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FILED

OCT 1 - 1948

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vs.

LOUISE E. MILLS, Administratrix of the Estate of Thomas
C. Mills, deceased,

Appellee.

PETITION FOR REHEARING.

*To the United States Circuit Court of Appeals, Ninth
Circuit, and the Judges Thereof:*

Comes now Joshua Hendy Corporation, the appellant in the above-entitled cause, and presents this, its Petition for Rehearing of the above-entitled cause, and in support thereof respectfully shows:

1. The Court in its opinion has based jurisdiction under the Portal-to-Portal Act upon the provisions of a Union agreement which was not introduced into evidence during the trial and which is not a part of the record before this Court. The provisions of such Union agreement were first brought into the case as an appendix to Appellee's

brief. Upon oral argument, Appellant's counsel referred to such contract provisions. He was stopped by the Honorable Justice Mathews and told that the Court would not consider a contract which was not part of the record. At such time, Honorable Justice Mathews made it clear to counsel that discussion of the contract would be a waste of time. With due respect for the Court's instruction, Appellant's counsel refrained from discussing such contract provisions and as a result was denied the privilege of pointing out to the Court wherein said provisions of the Union agreement were insufficient to create jurisdiction under the Portal-to-Portal Act.

2. The decision of the Court in this cause is of vital importance to employers and employees throughout the country by reason of the fact that practically all Union agreements which have been in effect during the past several years include provisions that overtime shall be paid for all work performed in excess of eight hours per day. If such provision is considered to be an express provision making any activity compensable, the Portal-to-Portal Act failed to accomplish what Congress intended it to do, for employees working under such Union agreements may assert that any activity they were engaged in was "work" within the meaning of the contract. The Portal Act was enacted so as to remove from the Courts the jurisdiction to determine the meaning of "work." As a consequence of not permitting argument concerning the contract, this Court did not have an opportunity to consider the following cases which are contrary to its decision: *Battery Workers Union v. Electric Storage Battery Co.* (U. S. D. C. Pa. 1948), 14 CCH Labor Cases, par. 64,298; *Millett v. Bethlehem-Hingham Shipyard* (U. S. D. C. Mass. 1948), 15 CCH Labor Cases, par. 64,590.

3. The Court based its opinion on two paragraphs of a contract which was not a part of the record. This contract contains twenty-three paragraphs. A full and proper consideration in this case requires a study of the entire contract.

Dated: September 30, 1948.

Respectfully submitted,
THELEN, MARRIN, JOHNSON & BRIDGES,
SAMUEL S. GILL,
ROBERT H. SANDERS,
Attorneys for Appellant.

Certificate of Counsel.

I, Samuel S. Gill, counsel for the above-named Joshua Hendy Corporation, appellant in this action, do hereby certify that the foregoing Petition for Rehearing of this cause is presented in good faith and not for delay and, in my judgment, is well founded.

SAMUEL S. GILL.

Dated at Los Angeles, California, September 30, 1948.

